83-1065

No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1983.

THE COUNTY OF ONEIDA, NEW YORK AND
THE COUNTY OF MADISON, NEW YORK,
PETITIONERS,

v.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, A/K/A THE ONEIDA NATION OF NEW YORK, A/K/A THE ONEIDA INDIANS OF NEW YORK; THE ONEIDA INDIAN NATION OF WISCONSIN, A/K/A THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.; THE ONEIDA OF THE THAMES BAND COUNCIL; AND THE STATE OF NEW YORK,
RESPONDENTS.

Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 545, 546, 643—August Term, 1982

Argued: January 18, 1983 Decided: September 29, 1983

Docket Nos. 82-7436, 82-7486, 82-7526

THE ONEIDA INDIAN NATION OF NEW YORK STATE, a/k/a THE ONEIDA INDIAN NATION OF NEW YORK, a/k/a THE ONEIDA INDIANS OF NEW YORK; THE ONEIDA INDIAN NATION OF WISCONSIN, a/k/a THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.; and THE ONEIDA OF THE THAMES BAND COUNCIL,

Plaintiffs-Appellants-Cross-Appellees,

—against—

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Defendants-Third Party Plaintiffs-Appellees-Cross-Appellants,

—against—

STATE OF NEW YORK,

Third Party Defendant-Appellant.

Before:

LUMBARD, MANSFIELD and MESKILL,
Circuit Judges.

Appeal from an order of the United States District for the Northern District of New York, Edmund Port, *J.*, holding the Counties of Oneida and Madison, New York liable to the Oneida Indian Nation under the Trade and Intercourse Act of 1793, awarding the Oneida Indian nation $16,694 against the two Counties, and finding that the State of New York must indemnify the Counties for all damages assessed against them.

Affirmed and remanded for a recalculation of damages.

Judge Meskill dissents in a separate opinion.

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BERTRAM E. HIRSCH, ESQ., Floral Park, N.Y., for Oneida Indian Nation of New York.

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Attorney General of the State of New York, Peter H. Schiff, Acting Attorney in Chief Appeals and Opinions, Albany, N.Y., of counsel), for State of New York.

ALLAN van GESTEL, ESQ., Boston, Massachusetts, (Jeffrey C. Bates, Esq., Laura L. Carroll, Esq., Goodwin, Procter & Hoar, Boston, Massachusetts, of counsel), for County of Oneida, New York, and County of Madison, New York.

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LUMBARD, *Circuit Judge*:

All three parties appeal from the judgment of the Northern District of New York, Edmund J. Port, *Judge*. The defendants, Counties of Oneida and Madison, New York, appeal from Judge Port's decision holding them liable for wrongful possession of plaintiffs' land. 434 F. Supp. 527 (N.D.N.Y. 1977). Plaintiffs Oneida Indian Nation of New York State, Oneida Indian Nation of Wisconsin, and Oneida of the Thames Band Council (collectively the "Oneidas"), as well as the Counties appeal from Judge Port's decision of October 5, 1981, on damages. Finally, third party defendant State of New York appeals from Judge Port's ruling of May 5, 1982, that it must indemnify the Counties for any damages

assessed. We affirm each of Judge Port's three rulings, but remand for further proceedings on the calculation of damages.

The three plaintiffs in this case are the descendants of the Oneida Indian Nation which inhabited central New York for many years until shortly after the Revolutionary War. The Oneidas were part of the Six Nations or Iroquois, the most powerful tribe in the Northeast.[1] Their land extended from the Pennsylvania border north to the St. Lawrence River, from the shores of Lake Ontario to the western foothills of the Adirondack Mountains.[2] During the Revolutionary War, the Oneidas were active allies of the colonists against the British. Their support prevented the Iroquois from taking a unified stand against the colonists—an important achievement for the confederated states.

After the War, the United States rewarded the Oneidas in the Treaty of Fort Stanwix, 7 Stat. 15 (October 22, 1784), by securing them "in the possession of the lands on which they are settled." Later, two additional treaties further secured the Oneidas in the possession of their land. *See* Treaty at Fort Harmar, 7 Stat. 33 (January 9, 1789); Treaty with Six Nations, 7 Stat. 44 (November 11, 1794). The settlers of the new nation, however, in their constant fever to expand soon invaded the Indians' territory. Thus, under increasing pressure from its white residents, the State of New York in 1788 purported to

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1 The Iroquois were composed of six tribes: the Cayuga, Mohawk, Oneida, Onondaga, Seneca, and Tuscarora.

2 Earlier in their history, before the influx of settlers, the Iroquois' land "extended from the hills of New England to the Mississippi River and from upper Canada into North Carolina." F. Cohen, *Handbook of Federal Indian Law* 417 (University of New Mexico Press reprint of 1942 ed.) (*Federal Indian Law*).

purchase most of the Oneidas' land—nearly five million acres.[3] The Oneidas retained about 300,000 acres near Oneida Lake.

As the pressure of new settlements everywhere continued to increase, the Indians became restive. In recognition of the frequently inequitable land purchases and to prevent Indian retaliation, the newly created federal government took an active role in protecting and securing the Indians in the possession of their land. President Washington and his Secretary of War, Henry Knox, encouraged Congress to enact legislation which recognized "that the Indian tribes possess the right of the soil of all lands within their limits, respectively, and that they are not be divested thereof, but in consequence of fair and bonafide purchases, made under the authority, or with the express approbation, of the United States." *American State Papers*, I *Indian Affairs* 53 (1834). Accordingly, Congress passed the Trade and Intercourse Act of 1790, Ch. 33, 1 Stat. 137 (hereinafter "1790 Act") which provided:

> [t]hat no person shall be permitted to carry on any trade or intercourse with the Indian tribes, without a [federal] license . . . [and] [t]hat no sale of land made by Indians . . . shall be valid to any person or persons, or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

Id. at 137-38.[4]

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3 Much of this land is presently the subject of another lawsuit, *see Oneida Indian Nation of New York v. New York*, No. 78-104 (N.D.N.Y. filed December 5, 1979).

4 Section four of the 1790 Act states in full:

> *And be it enacted and declared*, That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States,

The 1790 Act, however, was primarily declarative. It provided few enforcement mechanisms for protecting federal or tribal interest. Because it did little to stem the increasing illegal occupation of Indian lands, Congress in 1793 enacted a second Trade and Intercourse Act that added criminal penalties for illegally occupying Indian lands and authorized the President to remove trespassers from the land. Trade and Intercourse Act of 1793, Ch. 19, § 8, 1 Stat. 329, 330-31 (hereinafter "1793 Act"). The 1793 Act also provided that "informants" could enforce the section imposing fines on violators and collect one-half of the fine assessed.

Despite these statutory prohibitions, the State of New York attempted in 1795 to obtain Indian lands without the requisite federal approval. Throughout the ensuing months, the federal authorities repeatedly urged New York State Governor Clinton and his successor Governor John Jay to seek and secure the appointment of federal commissioners before the State negotiated any purchase of Indian lands. *See* 434 F. Supp. at 534-35. Despite this, the State sought an agreement with the Oneidas during the summer of 1795, over the express remonstrance of the federal authorities. *See id.* at 534. These negotiations led to the sale on September 15, 1795, in Albany, in contravention of the 1793 Act, of approximately 100,000 acres of the Oneidas' reservation. As the district court noted, however, the circumstances surrounding the Oneidas' assent to the purchase were fraught with irregularities. *Id.* 535. First, the Oneidas virtually never signed treaties outside their aboriginal land, yet the treaty was

shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

signed in Albany outside their aboriginal land boundaries. Second, normally the Oneidas' treaties were agreed to by unanimous consensus of the tribe; here, however, powers of attorney were given to individuals, none of whom were chiefs, to negotiate the transaction. Third, the State purchased the land for approximately fifty cents per acre. Within two years, the State in turn sold much of the land to white settlers for about $3.53 per acre.

Social and economic forces, including poverty, famine, alcoholism, and pressures on the Oneidas to move West resulted in the alienation of virtually all of their remaining New York acreage. Between 1795 and 1846, twenty-five more treaties between the State and the Oneidas were consummated, enabling the State to divest the Oneidas of all but a few hundred acres. Only two of these treaties (concerning land not here in question) were made with federal supervision and approval.[5] Furthermore, the State passed a statute that divided up the tribal landholdings and gave individual Indians a right to sell.

New York's abuse of the Oneidas was not accomplished without protest. Shortly after the 1784, 1787, and 1788 land purchases, the Oneidas contacted the federal government in protest over what they perceived as improper, deceitful, and overreaching conduct by the State. *See American State Papers*, I *Indian Affairs* 139 (1834). Their protest continued, especially between 1840 and 1875, and between 1909 and 1965. *See* 434 F. Supp. at 536.

Finally, in 1970 the Oneidas brought suit in the Northern District of New York claiming that the 1795

5 It has been estimated that the "State of New York acquired from the Indians all the western one-half of that state by nearly 200 treaties not participated in by the United States Government." *Federal Indian Law* at 420 n.24.

cession of land violated the Nonintercourse Act, and that the land was unconscionably purchased for an inadequate price. The complaint sought damages for the fair rental value of 871.92 acres which were part of the 1795 land transfer, for the period from January 1, 1968 to December 31, 1969. The district court on November 4, 1971, dismissed the complaint ruling that it asserted only a state law claim. Our affirmance over one judge's dissent, 464 F.2d 916, 918 (2d Cir. 1972), was unanimously reversed by the Supreme Court which held:

> Tribal rights [are] entitled to the protection of federal law, and with respect to Indian title based on aboriginal possession, the 'power of Congress . . . is supreme.'
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> The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13.

414 U.S. 661, 669-70 (1974) (footnotes and citation omitted).

On remand, Judge Port trifurcated the proceedings, dividing the case into separate trials on the issues of liability, damages, and indemnity. First, Judge Port held that the State's 1795 purchase violated the 1793 Act. He later assessed the Counties $16,694 in damages plus interest. In addition, Judge Port over the State's principal objection on eleventh amendment grounds held that the State must indemnify the Counties for all damages assessed.

I.

LIABILITY

Plaintiffs claim two bases for a finding of liability in this case: federal common law and the 1793 Nonintercourse Act.[6]

(A) *Federal commmon law.*

The Counties assert that the Oneidas had no federal common law rights at the time of the 1795 purchase, and alternatively that whatever common law action there may have been was preempted by the Trade and Intercourse Act. We reject both contentions.

The interrelationship of the Indian nations and the United States—including its constituent states—early in the new nation's history was recognized as involving uniquely federal interests. The Constitution reflected this concern by delegating to the federal government the authority to "regulate Commerce with Foreign Nations, and among the several states, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. This federal interest in regulating Indian affairs was enunciated not only in treaties, *see, e.g., Treaty of Fort Stanwix, supra*, and statutes, *see, e.g.*, Trade and Intercourse Act of 1790, *supra*, but also in the recognition by the courts of the availability of a federal common law action to vindicate Indian land claims. The Supreme Court referred to this proposition in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), one of its earliest cases involving the transfer of Indian land. Although the case involved a title dispute

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6 Judge Port found a violation of the Trade and Intercourse Act of 1793. In formulating a remedy, however, he looked to the common law.

between non-Indians, the Court subsequently interpreted the case to stand for the general principle "that an action in ejectment could be maintained on an Indian right to occupancy and use . . . . This is the result of the decision in *Johnson v. M'Intosh*." *Marsh v. Brooks*, 49 U.S. (8 How.) 223, 232 (1850). Furthermore, the Court repeatedly has emphasized that this Indian right to occupancy and use is a federal right. *See, e.g., Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667, 670 (1974) (it is a "rudimentary proposition" that after the Constitution was "adopted, these tribal rights to Indian lands became the exclusive province of the federal law."); *see also Mohegan Tribe v. Connecticut*, 638 F.2d 612, 626 (2d Cir.), *cert. denied*, 452 U.S. 968 (1981) ("the extinguishment of all Indian title was meant to be a matter of federal concern"). In the prior appeal in this case, the Supreme Court alluded to the existence of a common law action on several occasions in mandating the exercise of federal jurisdiction. "[A] tribal right of occupancy, to be protected, need not be 'based upon a treaty, statute, or other formal government action.' . . . nevertheless [it is] entitled to the protection of federal law . . . ." *Oneida Indian Nation*, 414 U.S. at 669, quoting *U.S. v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 347 (1941). "Absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law." *Id.* at 674. We conclude that the Oneidas may assert a federal common law action to recover damages for the Counties' wrongful possession of their land.

The Counties, however, argue that this federal common law action was preempted by the enactment of the Trade and Intercourse Act. They cite *Milwaukee v. Illinois,* 451 U.S. 304 (1981), in which the Supreme Court held that a

subsequently enacted federal statute preempted the federal common law cause of action it previously had upheld in *Illinois v. Milwaukee,* 406 U.S. 91 (1972). In *Illinois v. Milwaukee* the Supreme Court recognized the existence of a federal common law action for abatement of a public nuisance in polluted interstate waters. Nine years later, however, the Court found in *Milwaukee v. Illinois* that such an action could no longer be maintained. In the intervening years, Congress had passed the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816 (hereinafter "FWPCA"). Under these lengthy amendments and their appurtenant regulations, it is illegal for anyone to discharge pollutants into American waters without a permit. 33 U.S.C. §§ 1311, 1342. (1976 ed. & Supp. III). Moreover, the discharge permitted is restricted to effluent limitations established by Environmental Protection Agency regulations. The statute provided for dual enforcement both by the federal government and by citizen suits. *See id.* §§ 1319 & 1365. It specifies the relief that may be obtained, the ranges of monetary penalties for various violations, and authorizes imprisonment in certain cases. *Id.* § 1319(c). Other aspects of the statute include grants for research, water treatment works, and water pollution standards. *See generally id.* §§ 1251 et seq. Under these circumstances the Court concluded that "Congress ha[d] not left the formulation of appropriate [pollution] standards to the courts . . . but rather ha[d] occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *Milwaukee v. Illinois,* 451 U.S. at 317. Thus, when Congress "speaks directly to a question," *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 625 (1978), that originally "rested on federal common law, the need for such an

unusual exercise of lawmaking by federal courts disappears." *Milwaukee v. Illinois,* 451 U.S. at 314.

This case is quite different. The Trade and Intercourse Acts were not comprehensive statutes. They did not speak directly to the question of the Indians' ability to enforce their possessory rights by an action in ejectment. Rather, the Acts augmented the protection of Indian property rights previously afforded by federal common law by adding an additional statutory prohibition. This statute, *inter alia,* voided all land transactions in which Indians were a party that were consummated without federal approval. Furthermore, the 1793 Act both authorized the intervention of the President and the federal government on behalf of the Indians, and established criminal penalties for violations of the Act.[7] None of these statutory provisions expressly subsumed the common law modes of relief. There is no evidence to suggest that Congress intended to deny common law remedies to the Indians. In an analogous area involving congressional extinguishment

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7 Section eight states in full:

> *And be it further enacted*, That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made bya treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held, or claimed: *Provided nevertheless*, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty.

of Indian land titles, the Supreme Court has stated that evidence of such congressional intent should be "plain and unambiguous," and would "not be lightly implied in view of the avowed solicitude of the Federal Government for the Welfare of its Indian wards." *U.S. v. Santa Fe Pacific,* 314 U.S. at 346, 354. Neither should we imply a congressional intention to extinguish the Indians' common law remedy for vindicating their property rights in the absence of plain and unambiguous evidence of such a desire. Accordingly, we hold that the district court had jurisdiction to grant relief under federal common law.

(B) *Trade and Intercourse Act.*

Judge Port premised liability in large part on the State's violation of the 1793 Trade and Intercourse Act. On appeal, the State apparently does not question Judge Port's holding that the Act was violated. The 1793 Act explicitly required federal approval of a land purchase such as the 1795 cession. No such federal approval was obtained. The Counties, on the other hand, proffer five arguments in seeking to avoid liability: first, that the Trade and Intercourse Acts did not provide for a private suit for the enforcement of their provisions; second, that if such a suit could be maintained it abated upon expiration of the 1793 Act; third, that the Oneidas' claims are barred by the statute of limitations; fourth, that the claims are non-justiciable, and fifth, that the federal government subsequently ratified the 1795 transaction.

Implied Cause of Action.

It is beyond dispute that the Nonintercourse Acts were enacted for the protection of Indian tribes as beneficiaries. However, "the focus of [our] inquiry is on

whether Congress intended to create a remedy," *California v. Sierra Club,* 451 U.S. 287, 297 (1981). In resolving that question the Supreme Court has recently given us guidance:

> Our approach to the task of determining whether Congress intended to authorize a private cause of action has changed significantly, much as the quality and quantity of federal legislation has undergone significant change. When federal statutes were less comprehensive, the Court applied a relatively simple test to determine the availability of an implied private remedy. If a statute was enacted for the benefit of a special class, the judiciary normally recognized a remedy for members of that class. *Texas & Pacific R. Co. v. Rigsby,* 241 U.S. 33 (1916). Under this approach, federal courts, following a common-law tradition, regarded the denial of a remedy as the exception rather than the rule.
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> In view of the absence of any dispute about the proposition prior to the decision of *Cort v. Ash* in 1975, it is abundantly clear that an implied cause of action under the CEA was a part of the 'contemporary legal context' in which Congress legislated in 1974. *Cf. Cannon v. University of Chicago,* 441 U.S., at 698-699.

Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 374-75, 381 (1982).

When, prior to *Cort v. Ash,* 422 U.S. 66 (1975), an implied private remedy was part of the "contemporary legal context" in which Congress legislated, Congress will be deemed to have intended to preserve the remedy. *Id.,*

379-80; *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 730 (1975).

Application of these basic principles leads us to the conclusion that in enacting the Nonintercourse Acts Congress must have expected that they would be enforced by private actions since they were clearly intended for the benefit of the Indian tribes. The federal statutory structure was extremely simple and had not even approached the complexity which led to the adoption of the *Cort v. Ash* requirements. Indeed, the right to enforce the Acts through private actions has been assumed by various lower federal courts. *See, e.g., Mashpee Tribe v. New Seabury Corp.,* 427 F. Supp. 899, 903 (D. Mass. 1977); *Schaghticoke Tribe of Indians v. Kent School Corp.,* 423 F. Supp. 780, 784 (D. Conn. 1976); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.,* 418 F. Supp. 798, 805 & n.3 (D.R.I. 1976). Private enforcement has also been favored because of the federal government's poor performance of its statutory obligation to protect the Indians.[8] The congressional directives embodied in the Nonintercourse Acts frequently have been disregarded by the executive branch. *See, e.g., Narragansett Tribe,* 418 F. Supp. at 806 & n.4. Thus, by necessity, Indian tribes have been permitted to enforce the

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[8] *See, e.g., United States v. Ahtanum Irrigation District,* 236 F.2d 321 (9th Cir. 1956), *cert. denied* 352 U.S. 988 (1957):

> The numerous sanctimonious expressions to be found in the acts of Congress, the statements of public officials, and the opinions of courts respecting "the generous and protective spirit which the United States properly feels towards its Indian wards," *Oklahoma Tax Comm. v. United States,* 319 U.S. 598, 607, 63 S. Ct. 1284, 1288 87 L.Ed. 1612, and the " 'high standards for fair dealing' required of the United States in controlling Indian affairs," *United States v. Alcea Band of Tillamooks,* 329 U.S. 40, 47 67 S. Ct. 167, 170, 91 L.Ed. 29 are but demonstrations of a gross national hypocrisy.

Acts. In any event we believe that under conventional *Cort v. Ash* analysis, the Indians have an implied private cause of action to enforce the Nonintercourse Acts' proscriptions.

Cort v. Ash, 422 U.S. 66 (1975), outlines four factors to be used in determining whether Congress has intended that individuals may bring private suits to enforce a particular statute:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted,"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a rememdy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (citations omitted) (emphasis in original). We consider these four factors in that order.

(1) *Beneficiaries.*

The language and purpose of the 1793 Act are unequivocal in their purpose to protect the Indians. Section 1 provides that "no person shall be permitted to carry on any trade or intercourse with the Indian Tribes without a [federally granted] license . . . ." 1 Stat. at 329. Violators of the Act "shall forfeit all the merchandise offered for sale to the Indians," and they also may be imprisoned, and fined up to $1,000. *Id.* §§ 3 & 5, at 329-30. Furthermore, "no purchase or grant of lands . . . from any

Indians [without federal approval] shall be of any validity . . . ." *Id.* at § 8, at 330-31. The statute's purpose was "to prevent unfair, improvident or improper disposition by Indians of land owned or possessed by them to other parties . . . ." *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960); *see also Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 664 (1979) ("a major purpose of these acts as they developed was to protect the rights of Indians to their property").

(2) *Legislative Intent.*

The legislative history of the Nonintercourse Acts, which is sparse and incomplete, furnishes no clear expression on the question of whether Congress intended to create a private right of action for damages. Congressional committee reports generally are unavailable, and floor debates were seldom recorded. The absence of legislative history is neither unusual nor fatal. "The legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question." *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979). Nonetheless, "the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18 (1979). "[C]ongressional intent can be inferred from the language of the statute, the statutory structure," *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 94 (1981), "or in the circumstances of [the statute's] enactment." *Transamerica*, 444 U.S. at 18. *See also Cannon v. University of Chicago*, 441 U.S. at 698-99; *California v. Sierra Club*, 451 U.S. 287, 296 n.7 (1981).

The circumstances surrounding the enactment of the 1793 statute show that Congress intended to provide maximum protection of Indian land—and that this protection included the power to commence a private action.[9] The earlier 1790 Act in large part was due to the efforts of President George Washington and his Secretary of War, Henry Knox. Both men were "of high integrity and had extensive experience in Indian affairs." F. Prucha, *American Indian Policy in the Formative Years*: The Indian Trade and Intercourse Acts of 1790-1834 at 43-44 (1962) (hereinafter "*American Indian Policy*"). President Washington personally appeared before Congress and warned that legislation was needed to bolster the faltering relations with Indian Tribes. *See Sen-Exec. Journal*, 1st. Cong., 1st Sess. 20-24 (1789); I *Annals of Congress* 933 (1790).[10] Secretary Knox urged that if it were "declared by law . . . that the Indians possess the right to all their territory which they have not fairly conveyed, and that they should not be divested . . . [except by] treaties made under the authority of the United States, the foundation

9 We reject the State's initial contention that Indian tribes lacked capacity to sue in federal court, and thus Congress could not have intended to create a private cause of action on their behalf. Although suits by tribes may have been rare the reasons for this were cultural, not legal:

> Except for the Cherokee, who had experienced some intermarriage and infusion of Anglo-American legal concepts, the tribes were ignorant of American legal processes and were still politically organized in traditional fashions, making resort to American courts virtually impossible.

Clinton & Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 Me. L. Rev. 17, 46 (1979).

10 As Secretary Knox said in a letter to North Carolina Governor Blount, quoted in *American Indian Policy* at 41: "The Indians have constantly had their jealousies and hatreds excited by the attempts to obtain their land."

of justice and peace would be laid." *American State Papers*, I *Indian Affairs* 53 (1834). The 1790 Act which followed embodied these "principles of justice and moderation, as [would] enforce the approbation of the dispassionate and enlightened part of mankind . . . [and it represented a policy of] conciliation of the Indians by negotiation . . . liberality, express guarantees of protection . . . and developed trade." *Id.* at 41, 44.

Section 4 of the 1790 Act stated that "no sale of lands made by any Indians . . . shall be valid . . . unless the same shall be made . . . under the authority of the United States." 1 Stat. at 138. Section 4's prohibition against non-federally approved Indian land sales did not carry with it any substantive penalties for its violation,[11] nor were there any mechanisms for enforcing its prohibition. Nonetheless, Congress must have intended that section 4 would be enforced by some party or institution. *See Transamerica*, 444 U.S. at 18-19. In *Transamerica*, the Supreme Court construed a securities' statute that was constructed similarly to the 1790 Act. Section 215 of the Investment Advisors Act of 1940 states that all waivers of compliance and "[e]very contract made in violation of any provision of this subchapter . . . shall be void. . . ." 15 U.S.C. § 80b-15. Like section 4 of the 1790 Act, 80b-15 simply declared that certain transactions were void. It did not explicitly provide for enforcement. Under these circumstances, the Supreme Court found that Congress intended a private right of action to enforce section 80b-15.

11 Sections 2 and 3 which dealt with licensed traders, on the other hand, expressly included enforcement by the United States and perhaps by "informants" suits. *See* 1 Stat. at 138-39.

> By declaring certain contracts void, [section 80b-15] by its terms necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere. At the very least Congress must have assumed that [section 80b-15] could be raised defensively in private litigation to preclude the enforcement of an investment advisors contract. But the legal consequences of voidness are typically not so limited. A person with the power to avoid a contract ordinarily may resort to a court to have the contract rescinded and to obtain restitution of consideration paid.
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> For these reasons we conclude that when Congress declared in [section 80b-15] that certain contracts were void, it intended that the customary legal incidents of voidness would follow.

Transamerica, 444 U.S. at 18, 19.

By analogy, if the State violated the 1790 Act, logically the Indians would have had "the customary legal incident" of a private right of action to enforce its strictures. With no express enforcement provisions accompanying section 4, a statutory interpretation that did not permit a private right of action would render section 4 unenforceable.

As the 1790 Act was set to expire in 1793, Congress passed the Trade and Intercourse Act of 1793 in which section 8 incorporated the original language of the 1790 Act which had voided all Indian land transactions negotiated without federal approval. In addition, it provided that violation of the section was a misdemeanor punishable by a fine and imprisonment.[12] The statute also

12 Violation of the 1793 Act was punishable by a fine up to $1,000 and imprisonment not to exceed twelve months. 1793 Act § 8, 1 Stat. at 330.

authorized the executive branch, at the discretion of the President, to remove violators from Indian land. Other sections regulating trade with the Indians also were added to the Act, with penalties for their violation.[13]

These upgraded remedies were designed to correct the perceived shortcomings of the 1790 statute. The 1790 Act had failed to protect the Indians adequately from predatory encroachment, trade, and land purchases. President Washington had urged Congress in his 1791 annual address to enact an "efficacious provision . . . inflicting adequate penalties upon all those who, by violating [the Indians'] rights, shall infringe the treaties and endanger the peace of the Union." 'Third Annual Address, President George Washington,' 1 *Messages and Papers of the President*, 105 (Richardson, ed., 1896). He renewed his plea in late 1792 stating, "I cannot dismiss the subject of Indian affairs without again recommending to your consideration the expediency of more adequate provision for giving energy to the laws throughout our interior frontier

13 The significant additions to the Trade and Intercourse Act included: Section one prohibited trade with Indians without a federally granted license. To obtain such a license, a licensee had to submit a $1,000 bond. Section two permitted the recall of the license, as well as recourse to the bond for any breaches of conditions placed on the licensee. The third section penalized unlicensed trading with Indians by imposing forfeiture of the merchandise traded, and a fine and imprisonment up to $100 and 30 days respectively. Crimes committed against Indians on Indian land were to be treated as if committed on non-Indian land under section 4. Section 5 proscribed settlement on Indian land with an attendant fine between $100 and $1,000 and imprisonment not to exceed twelve months for any violations of the section. The President was also authorized to remove unlawful settlors. Section 6 required a special license "to purchase any horse of an Indian, or of any white man in the Indian territory," and provided that persons purchasing horses without such a special license would forfeit both the horse and a sum not more than one hundred dollars, nor less than thirty dollars. One half of the forfeiture would be distributed to the prosecuting "informant" and one-half would go to the federal government.

. . . ." Speech of President George Washington, 2d Cong., 2d Sess., November 6, 1792, 1 *American State Papers*: *Indian Affairs*, at 119. In response, Congress enacted the more stringent 1793 statute, to increase the law's effectiveness through additional enforcement mechanisms. There is no suggestion that Congress intended to subtract from the statutes' remedies. Accordingly, we agree with the district court that the private right of action that existed under the 1790 Act remained intact in the 1793 Act.

Our conclusion that Congress intended that private parties would have a cause of action to enforce the 1793 Act is further supported by other evidence of congressional intent. For example, in 1822 Congress amended the Trade and Intercourse Act of 1802—which essentially continued the 1793 Act's land alienation provision—to place the burden of proof on white persons in all cases in which Indians were parties. 3 Stat. 683 (1822). This pertained to "all trials about the right of property in which Indians shall be party on one side, and white persons on the other." *Id.* This provision only makes sense if Congress had intended the Trade and Intercourse Acts to authorize Indians to appear as plaintiffs to enforce the Acts, as well as to be defendants.

Furthermore, the 1793 Act's misdemeanor provison only appears to apply to "negotiators" of Indian land cession transactions. The State, rather than Counties, thus would appear to be subject to the criminal penalties of the statute. *Cf. Rewis v. United States*, 401 U.S. 808, 812 (1971) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."). Without the availability of a private right of action against the Counties the only remedy would be the executive's discre-

tionary removal of violators.[14] Presidential authority to remove intruders even when exercised, however, often proved ineffectual. *American Indian Policy* at 158-66. Thus, absent a right of action, the Oneidas would have a right under a statute that was unenforceable. For all these reasons, we conclude that Congress intended that Indian litigants could bring private suits to enforce the 1793 Act's prohibition of certain land cessions.[15]

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14 *Cf. Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 374 (1968):

> [T]he general power of the United States to safeguard an allotment affected the capacity of the Indian to protect that allotment. Furthermore, the Bureau of Indian Affairs, which is the agency of the Department of the Interior charged with fulfilling the trust obligations of the United States, is faced "with an almost staggering problem in attempting to discharge its trust obligations with respect to thousands upon thousands of scattered Indian allotments. In some cases, the adequate fulfillment of trust responsibilities on these allotments would undoubtedly involve administrative costs running many times the income value of the property." H.R. Rep. No. 2503, 82d Cong., 2d Sess., 23 (1952). Recognizing these administrative burdens and realizing that Indian's right to sue should not depend on the good judgment or zeal of a government attorney, the United States has indicated its support of petitioners' position that Indians have a capacity to sue under the oil and gas lease.

(footnote omitted).

15 The only remnants of legislative history available indicate that President Washington, who was the moving force behind the 1790 and 1793 Acts, thought that they permitted the Indians to bring private causes of action. Cornplanter, Chief of the Seneca Indians, another tribe of the Six Nations, had met with President Washington in December 1790 to present their complaints about certain land transactions entered into during the prior decade. *American State Papers*, I *Indian Affairs* 139 (1834). Washington assured Cornplanter that at least after 1790, "the case [was] entirely altered; . . . any treaty formed and held without [the federal government's] authority [was] not binding." *Id.* Moreover, "[i]f . . . you have any just cause of complaint against and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other persons." *Id.* This speech was printed and communicated to Congress on January 11, 1792. *Id.* 142-43. Congress, therefore, was made aware of President Washington's perception of the reach of Indian law.

(3) *Statutory Purpose.*

The purposes of the 1793 Trade and Intercourse Act are best served by the implication of a private right of action. "[A] major purpose of the Acts as they developed was to protect the rights of Indians to their properties." *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 664 (1979). *See also U.S. v. Southern Pacific Transportation Co.*, 543 F.2d 676, 697 (9th Cir. 1976) (the statute was meant to "prevent the steady diminution of Indian territory . . . unless . . . by public treaty."). The Supreme Court has stated that it is "decidedly receptive" to the implication of a "private remedy [that] is necessary or at least helpful to the accomplishment of the statutory purpose . . . ." *Cannon v. University of Chicago*, 441 U.S. at 703. A private right of action is necessary in view of the virtually complete failure of other statutory remedies to provide the Indians with any real protection. *See United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957); *American Indian Policy* at 147, 158-66.

(4) *Federal or State Concern.*

As stated above the Indians have a federal common law possessory cause of action. Moreover, it is well settled that laws affecting the Indians are principally the province of federal, not state law. *See, e.g., Oneida Indian Nation*, 414 U.S. at 669; *Hughes v. Washington*, 389 U.S. 290, 292-93 (1967); *Board of Commissioners v. United States*, 308 U.S. 343, 350-51 (1939); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

Thus, all four prongs of the *Cort v. Ash* test have been met. Accordingly, we hold that the Oneidas had a private

right of action to enforce the Trade and Intercourse Act of 1793. We now turn to defendant's other arguments.

Abatement of the Cause of Action.

The Counties argue that even if the Oneidas could have brought suit under the 1793 Act, that cause of action has since abated. The 1793 Act expired after "two years, and from thence to the end of the then next session of Congress . . ." 1 Stat. at 332. Appellants assert, quoting *The General Pinkney*, 9 U.S. 5 (Cranch) 281, 283 (1809), that after the termination of the 1793 Act, "no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force unless some special provision be made for that purpose by statute." We disagree. The pertinent provision of the 1793 Act remains operative. 25 U.S.C. § 177 (1983) states that "[n]o purchase . . . of lands . . . from any Indian nation or tribe of Indians shall be of any validity . . . unless same be made by treaty . . . under the authority of the United States." Under these circumstances, "the better and prevailing rule is that so much of the original as is repeated in the later statute without substantial change is affirmed and continued in force without interruption." *Great Northern Ry. Co. v. United States*, 155 F. 945, 948 (8th Cir. 1907). Abatement is inapplicable according to this proposition because the underlying rationale of abatement is inapposite. Abatement "[i]mputes to Congress an intention to avoid inflicting punishment at a time when it would no longer further any legislative purpose. . . ." *Hamm v. City of Rock Hill*, 379 U.S. 306, 313 (1964). Because the 1793 statute remains essentially in force in 25 U.S.C. § 177, the continued invalidity of the illegal transactions would "further a legislative purpose," namely, protection of Indian land title.

Miscellaneous Objections to Liability.

Appellants raise three other arguments against liability: the statute of limitations, non-justiciability, and subsequent federal ratification of the 1795 transaction.

(1) *Statute of Limitations.*

Appellants claim that this suit, instituted 175 years after the cause of action accrued is time-barred. We disagree. State statutes of limitation are inapplicable. As we recently emphasized, in cases involving Indian land claims "[d]efenses based upon state adverse possession laws and state statutes of limitation have been consistently rejected." *Mohegan Tribe v. State of Connecticut*, 638 F.2d at 614-15 & n.3. Moreover, state statutes of limitation are not borrowed "if their application would be inconsistent with the underlying policies of the federal statute." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977). Applying New York's statute would permit a violation of the 1793 Act to go unremedied, and thus would be patently inconsistent with the Trade and Intercourse Acts. In addition, we have recently rejected the assertion that such actions are time-barred noting that "[i]t is clearly established that a suit by the United States as trustee on behalf of an Indian tribe is not subject to state delay-based defenses. It would be anomalous to allow the trustee to sue under more favorable conditions that those afforded the tribes themselves." *Oneida Indian Nation of New York v. New York*, 691 F.2d 1070, 1083-84 (2d Cir. 1982) (citation omitted).

Suits brought by the United States on behalf of Indian tribes are governed by the special statute of limitations set forth in 28 U.S.C. § 2415 which provides some guidance in the present situation. Under section 2415(c) there is no

time limitation if the action is to "establish the title to, or right of possession of, real or personal property." Section 2415(a) provides that actions in contract seeking money damages that accrued prior to July 1966 are timely if filed prior to December 31, 1982. Thus, had the United States brought the instant suit in 1970 instead of the Oneidas, it would not have been time-barred. We conclude that "at the very least, suits by tribes should be held timely if such suits would have been timely if brought by the United States." *Id.* at 1084

(2) *Justiciability.*

Appellants advance several reasons in support of their assertion that the Oneidas' claims present non-justiciable political questions:

(1) determination of the lawfulness of and remedy for the Counties' occupancy has been committed to the President;

(2) determination of the Plaintiffs' claim entails a choice among contenders for the right to govern the area covered by the 1795 conveyance;

(3) determination of the Plaintiffs' claim entails the allocation of tribal property, which is committed to Congress;

(4) determination of these questions by a federal court entails the risk of multifarious pronouncements on the foregoing questions by the different branches of the federal government.

Our holding that the Oneidas have a federal common law cause of action and an action to enforce the 1793 Trade and Intercourse Act negates defendants' argument

that the exclusive remedy against illegal occupiers is committed to the President. *Accord*, *e.g.*, *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661 (1974); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975); *Fort Mojave Tribe v. Lafollette*, 478 F.2d 1016 (9th Cir. 1973); *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899 (D. Mass, 1977); *Schaghticoke v. Kent School Corp.*, 423 F. Supp. 780 (D. Conn. 1976); *Narragansett Tribe v. Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798 (D. R.I. 1976).

The Counties' next two propositions also must be rejected. They assert that the effect of the district court's decision is to transfer the sovereignty of over 100,000 acres of New York State land "to at least three tribal factions who are, and who have been for years, feuding over which is the proper government tribe." This, they assert, is an issue "on which the district court must defer 'to the political departments.'" *Id.*, quoting, *Baker v. Carr*, 369 U.S. 186, 215 (1962).

The district court found that the three plaintiffs were the direct descendants of the Oneida Indian Nation that inhabited the land in question in 1795. 434 F. Supp. at 532. Judge Port based this decision on expert testimony, implicit United States' verification stemming from annuity payments, and recognition by the Bureau of Indian Affairs. *Id.* at 532-33. Appellants have given us no reason to disturb this finding. Hence, there is no need to intrude on internal tribal governance; moreover, the appropriate allocation of damages amongst the plaintiffs is not a

question that is presently before us on appeal.[16] Furthermore, as we observed in *Oneida Indian Nation v. New York*, "[t]o our knowledge no Indian land claim has ever been dismissed on non-justiciability grounds." 691 F.2d at 1081.

Finally, the Counties assert that our holding will have catastrophic ramifications. We rejected this argument in *Oneida Indian Nation v. New York*, in which we stated "we know of no principle of law that would relate the availability of judicial relief inversely to the gravity of the wrong sought to be addressed." *Id.* at 1083; *see generally id.*

(3) *Subsequent Federal Ratification.*

The Counties assert as a third defense to liability that the United States subsequently ratified the 1795 transaction in two federally approved treaties between the Oneidas and the State. The Treaty of June 1, 1798, describes the 1795 transaction as a "purchase." It also provides in relevant part:

> The said [Oneida] Indians do cede, release, and quitclaim to the people of the State of New York, forever, all the lands within their reservation, to the westward and southwestward of a line from the northeastern corner of the lot No. 54, *in the last purchase from them* running northerly to a button wood tree, . . . standing on the bank of the Oneida lake[.]

Treaty of 1798 (emphasis added). The "last purchase" referred to in this treaty, the parties agree, was the 1795

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16 *See* 434 F. Supp. at 538 n.20 ("Since this phase of the trial is solely to determine liability, the rights of the individual plaintiffs to share in a recovery can be left for another day.").

transaction. The federally approved Treaty of June 4, 1802 also mentions lands "heretofore ceded . . . to the State of New York," ostensibly a reference to the 1795 purchase. In addition, both treaties refer to lots 54 and 59 which were part of the 1795 transaction.

We agree with the district court which cited *United States v. Santa Fe Pacific* in its holding that the reference in these treaties were not a "plain and unambiguous" ratification of the 1795 transaction. In *United States v. Santa Fe Pacific*, the Supreme Court refused to find that an ambiguous congressional pronouncement had acted to extinguish Indian land title. In so doing, the Court stated that " '[u]nquestionably it has been the policy of the federal government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States.' " 314 U.S. at 345, quoting *Cramer v. United States*, 261 U.S. 219, 227 (1923). Extinguishment of the Indians' title could not be "lightly implied" because "[c]ertainly, it would take plain and unambiguous action to deprive the Walapais [Indian tribe] of the benefits of that policy." *Id.* at 346, 354.

In arguing that the "plain and unambiguous" standard is inapplicable, the Counties attempt to distinguish the claimed ratification herein from the extinguishment of Indian title involved in *United States v. Santa Fe Pacific*. The distinction, however, is a meaningless one. Ratification also would serve to extinguish the Oneidas' title. We find the Counties' argument wanting for a second reason. Even under the standard propounded by the Counties it cannot be said that isolated references to land boundaries in the 1798 or 1802 treaties, which are little more than "metes and bounds" descriptions, are sufficient to constitute ratification of the 1795 transaction. Moreover, neither treaty makes any reference to the validity of the

underlying 1795 "purchase." There is no evidence that the federal authorities were then aware of any claim of illegality of the prior land sale.

II.

DAMAGES

After a separate trial on the issue of damages, Judge Port on October 5, 1981 awarded the Oneidas $9,060 plus interest against Madison County, and $7,634 plus interest against Oneida County for their unlawful use and occupation of the Oneidas' land for the years 1968 and 1969.[17] Judge Port arrived at these amounts by calculating the fair rental value of the land as unimproved for the years 1968 and 1969. Against those amounts he allowed the Counties a set-off for improvements because they occupied the land in good faith, and without knowledge of the unlawfulness of their continued occupation.

The appellants raise three issues regarding Judge Port's decision. The first is whether the Counties as allegedly good faith occupiers of the Oneidas' land can be held liable in damages. The second issue concerns the district court's ruling that the Counties could set-off against the damages assessed the amount of improvements they made on the land. And the third question is whether the law of eminent domain is relevant to the calculation of damages.

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17 As we noted earlier, *see supra* note 6, the district court found a violation of the 1793 Trade and Intercourse Act, but appeared to resort to the common law in formulating a damage remedy. We understand the district court to have examined the common law only to assist it in formulating a statutory damage remedy.

A. *Availability of a Damage Remedy.*

The Counties claim first that they did not violate the 1793 Trade and Intercourse Act, and second that if they did, the Act explicitly provides the exclusive remedies for its violation. They note that it was the state that violated the 1793 Act in 1795 and not the Counties,[18] which were subsequent occupiers of the land.[19] Even bad faith occupation would not violate the Act, the Counties assert, because section 8 regulates the disposition, not the occupation of Indian land. The Counties also contend that, in any event, they are good faith occupiers, and that the 1793 Act was not intended to assess damages against those holding land in good faith.

The Counties, however, do not question Judge Port's holding that the 1795 transfer of Indian land was void.[20] In effect the Counties have asked us to find that their good faith occupation of Oneida land can act as a subsequent validation of the 1795 transaction. To accept the Counties' argument, however, would render the Trade and Intercourse Acts wholly ineffective.[21]

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18 Oneida County was established in 1798 and Madison County in 1806. J. Lomenzo, *Manual for the Use of the Legislature of the State of New York* 310 (1938 ed.).

19 The district court was not able to ascertain when the Counties began their occupation of the Oneidas land, determining only that it was sometime in the 1800's.

20 Moreover, Judge Port's determination was amply supported. *See* 434 F. Supp. at 537-40

21 When Congress intended a provision in the same statute to contain an intent or good faith element it simply did so expressly. *See* § 6, 1 Stat. at 330 ("every person, who shall purchase a horse, knowing him to be brought out of Indian territory, by any person or persons not licensed, as above, to purchase the same shall forfeit the value of such horse.").

As we previously stated, the Oneidas are entitled to enforce the Nonintercourse Act's voiding of the 1795 purchase. This is what the Oneidas' lawsuit seeks to do. Their suit closely corresponds to the common law action for ejectment in which a plaintiff need only establish his right to possession. *See New York v. White*, 528 F.2d 336, 338 (2d Cir. 1975); *see also Taylor v. Anderson*, 234 U.S. 74 (1914). The Oneidas' claim is based on their present right of possession, *see Oneida Indian Nation*, 414 U.S. at 666, and the Counties' liability is premised on their continued occupancy of Oneida land in violation of the Act. Under the common law the good or bad faith of the occupant is irrelevant to his liability. *See, e.g., Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 80-81 (1823); *Miceli v. Riley*, 436 N.Y.S.2d 72, 74-75, 79 A.D.2d 165 (1981). The Counties' occupation, regardless of their good or bad faith, of Indian land obtained in a transaction that violated the 1793 Act renders them liable.

The Counties also contend, however, that if their possession does violate the Act, the only remedies for their violation are expressly set out in the statute. *See supra* note 10. It follows from our conclusion that the Oneidas have a private cause of action that Congress intended the concomitant damage remedy that flows with it to be available; it is a "customary legal incident" of the private action. *See Transamerica*, 444 U.S. at 19. The Counties' conclusory statement that the statute provides the exclusive remedies for its violation, without citation to any legislative history, ignores the Supreme Court's repeated admonitions: "The creation of one explicit mode of enforcement is not dispositive of congressional intent with respect ot other complementary remedies." *California v. Sierra Club*, 451 U.S. at 295 n.6, citing *Transamerica*, 444 U.S. at 29 n.6 (White, *J.*, dissenting); *Cort*

v. Ash, 422 U.S. at 82-83 n.14. Accordingly, we agree with Judge Port that the Counties are responsible for the continuing violation of the 1793 Act and are liable in damages for that violation.

B. *Improvements' Set-Off.*

Since the Counties assumed possession of the Oneidas' land they have erected or completed several improvements on the land. They asserted, and the district court held, that the Counties were entitled to a set-off of the value of these improvements against the Oneidas' fair rental value damages. The improvements on the 871.92 total acres were: 809 acres used as highways; the 47.22 acre Champlain Battleground Park; a 2.07 acre parcel used as a fire department radio tower and a 13.13 acre gravel bed. To arrive at the rental value less improvements the court simply calculated the fair rental value of the land as unimproved.

Neither party appears to question Judge Port's fair rental value method of calculating damages.[22] Thus, the only dispute is whether the district court could set-off the value of improvements against the fair rental value damages. The court applied the common law rule that a good-faith occupier of land is entitled to a set-off for improvements. *See Green v. Biddle*, 21 U.S. (8 Wheat.) at 59; *see also Miceli v. Riley*, 436 N.Y.S.2d at 74; *Berney v. Brodie*, 272 N.Y.S.2d 881, 26 A.D.2d 679 (1966); 42 C.J.S. Improvements § 7 at 432 (1944). The Oneidas argue first that the common law rule should not be applied because it would frustrate the purposes of the 1793 Act by rewarding trespassers and encouraging un-

22 *See Utah Power & Light Co. v. United States*, 243 U.S. 389, 411 (1917); *New Orleans v. Gaines*, 82 U.S. (15 Wall.) 624 (1872).

lawful alienations and occupations. We disagree. Presumably, the common law rule is based on the premise that to require forfeiture by the good-faith occupier of the value of its improvements would work an injustice and provide little in the way of added deterrence. A contrary rule would not discourage good faith trespassers from their illegal occupation because it is based on a mistaken, though still wrongful, belief of ownership. We are not prepared to require the good faith non-active wrongdoer, here a political subdivision, to forego the value of improvements it made in the absence of any policy benefits. If good faith occupiers were not credited with the value of their improvements, this would lead to the anomalous result that they usually would suffer higher damages than bad faith occupiers because good-faith occupants are more likely to make improvements.

The Oneidas next question the district court's finding that the Counties held the land in good faith. We find this issue more troublesome. The burden of proving good faith, rests on the Counties. *See, e.g., United States v. Wilson*, 523 F. Supp. 874, 900-901 (N.D. Iowa 1981); *Deakyne v. Lewes Anglers, Inc.*, 205 F. Supp. 415 (D. Del. 1962); *Church of God Prophecy v. Ferris*, 244 N.Y.S.2d 279, 281, 19 A.D.2d 934 (1963). The record does not show, however, whether the district judge placed the burden of proof on the Counties or on the Oneidas. Judge Port's opinion merely states that "there is no evidence to connect the defendants, these two Counties, with [the State's] act of bad faith; nor is there any other evidence indicating that they were bad-faith occupiers of the land in 1968 or 1969 . . . ." At trial, however, the Counties only profferred evidence that they had been acting in good faith since 1970. Inasmuch as the Counties had possession of the Oneidas' land since sometime in the

1800's, it is not enough that they established good faith since 1970. On the basis of the present record, however, we are not prepared to overturn Judge Port's determination that the Counties had acted in good faith. We leave clarification of the issue of good faith to the district court on remand.

C. *Computing Damages at 90% of the Fair Rental Value.*

The Oneidas' last argument is that the lower court erred in calculating at less than 100% of the fair rental value certain lands through which highways presently run. Judge Port stated in his opinion:

> That plaintiffs were entitled to possession the same as any landowner is before an eminent domain and he was deprived of that possession by the conduct of the defendant so that the damages sustained by both plaintiffs can be viewed as substantially the same and, generally speaking, the rules of eminent domain could be applied here and do justice to the parties.

Judge Port then analogized the Oneidas' claim to a request for "just compensation" for a road easement condemnation, and calculated the fair rental of 90% of the value of the property. We cannot agree that such a discount is appropriate. It treats the Counties' occupation as if it were a lawfully obtained easement. We see no reason why there should be any diminution of the damages even if the uses were for a public purpose. Accordingly, on remand the district court should calculate damages without any discount.

III.

INDEMNIFICATION

The Counties filed third-party complaints against the State seeking indemnification of any damages assessed against them for their possession of the Oneidas' land. The State moved to dismiss the complaints, and the Counties cross-moved for summary judgment. Judge Port granted the Counties' motion over the State's objections that the court lacked subject matter jurisdiction, that the complaint failed to state a cause of action, and that the State's eleventh amendment immunity to suit barred the action.

A. *Subject Matter Jurisdiction*

The State maintains that the district court erred in holding that it had ancillary jurisdiction over the indemnity action, contending that the indemnity suit does not arise out of the same core of operative facts as the Oneidas' claim against the Counties. Any indemnity liability, the State argues, would stem from the State's disposition of the land to the Counties, and not from its acquisition of the land in violation of the Trade and Intercourse Act. We disagree. In order to establish their right to indemnity the Counties must show that they are compelled to pay monetary damages as a result of the State's wrongful conduct—here, New York's violation of the 1793 Act. *See Great American Ins. Co. v. United States*, 575 F.2d 1031, 1035 (2d Cir. 1978); *Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp.*, 465 F. Supp. 790 (S.D.N.Y. 1978); *Taft v. Shaffer Trucking, Inc.*, 383 N.Y.S.2d 744, 52 A.D.2d 255 (1976). The Counties' indemnity claim, therefore, is based largely on

the same facts that established the Counties' liability. The Oneidas alleged and proved that the State had violated the 1793 Trade and Intercourse Act. Plaintiffs established, moreover, that the Counties were wrongfully occupying this land that had devolved from the State to the Counties: These same facts also establish the legal and equitable basis for the Counties' indemnity action. *See supra* section (II) (A). When the action for indemnification arises out of the same core of facts, the court's jurisdiction is "ancillary to its jurisdiction over the main action," *United States v. Farr & Co.*, 342 F.2d 383, 384 n.1 (2d Cir. 1965), and no independent basis for jurisdiction is necessary. *See* Fed. R. Civ. P. 14(a); *Agrashell, Inc. v. Bernard Sirotta Co.* 344 F.2d 583, 585 (2d Cir. 1965; *Dery v. Wyer*, 265 F.2d 804, 807 (2d Cir. 1959); *Ayer v. General Dynamics Corp.*, 82 F.R.D. 115, 121 (S.D.N.Y. 1979); 3 J. Moore, Moore's Federal Practice § 14.26, at 14-108 & n.6 (1982).

B. *Failure to State a Cause of Action.*

We find no merit in the State's assertion that there is no cause of action for indemnity. "It is nothing short of simple fairness to recognize that '[a] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity.' Restatement, Restitution, § 76." *McDermott v. City of New York*, 50 N.Y.2d 211, 406 N.E.2d 260, 428 N.Y.S.2d 643, 646 (1980). Therefore, when "payment by one person is compelled, which another should have made . . . a contract to reimburse or indemnify is implied by law." *Brown v. Rosenbaum*, 287 N.Y. 510, 518-19, 41 N.E.2d 77 (1942); *see also Dunn v. Uvalde*

Asphalt Paving Co., 175 N.Y. 214, 217-18, 67 N.E. 439 (1903); *Oceanic S.N. Co. v. Compania Transatlantica Espanola*, 134 N.Y. 461, 465-68, 31 N.E. 987 (1892); *City of Brooklyn v. Brooklyn City R.R. Co.*, 47 N.Y. 475, 486-87 (1872); Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. of Pa. L. Rev. 130, 147 (1932); Meriam & Thornton, *Indemnity Between Tortfeasors: An Evolving Doctrine in the New York Court of Appeals*, 25 N.Y.U.L. Rev. 845 (1950).

C. *Eleventh Amendment Immunity.*

The State argues that the eleventh amendment is a bar to the Counties' claim against it. The amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

We agree with the district court that the eleventh amendment is not a bar to action against the State of New York. The State's acquisition of the Oneidas' land was in subordination to the power of Congress to legislate regarding Indian lands, pursuant to Article 1, Section 8 of the Constitution.[23] The 1790 and 1793 Acts of Congress placed New York on notice that Congress had exercised its power to regulate commerce with the Indians.[24] Thus,

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23 "By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." *Parden*, 377 U.S. at 192.

24 Section 8 of the 1793 Act prohibited purchases of Indian lands not negotiated "under the authority of the United States." *See supra* note

anything New York thereafter did with respect to Indian lands carried with it a waiver of the State's eleventh amendment immunity. *See Edelman v. Jordan*, 415 U.S. 651, 672 (1974); *Employees v. Missouri Public Health & Welfare Dept.*, 411 U.S. 279, 283-84 (1973).[25]

In *Parden v. Terminal Ry. Co.*, 377 U.S. 184 (1964), the state of Alabama owned and operated a railroad in interstate commerce. Alabama had commenced its railroad operation twenty years after the enactment of the Federal Employers Liability Act, 45 U.S.C. §§ 51-60 ("FELA"). This Act permitted a railroad employee to sue his or her employer for personal injuries sustained in the course of employment. The Court found that Congress had conditioned operation of a railroad on acceptance of potential FELA liability and any damage suits arising therefrom; by starting the railroad after the FELA had been enacted, Alabama had constructively consented to a waiver of its immunity. 377 U.S. at 192; *see also County of Monroe v. State of Florida*, 678 F.2d 1124, 1133 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 762 (1983). The importance of the chronology in *Parden* became readily apparent after the Supreme Court's subsequent decisions in *Edelman* and *Employees*. Unlike *Parden*, "[i]n neither of those cases did the state have sufficient notice that it would be liable for damages if it participated in the

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7. Similarly, section 4 of the 1790 Act stated "[t]hat no sale of lands made by Indians . . . shall be valid to any person or persons, or to any state . . . ."

25 The Supreme Court has not stated the necessity of proving state waiver of immunity in the fourteenth amendment context. *See, e.g., Fitzpatrick v. Bitzer*, 427 U.S. at 456. By ratifying the fourteenth amendment after the eleventh amendment, the states can be said to have waived their immunity in all cases in which Congress exercises its enforcement power under section 5 of the fourteenth amendment.

federal programs." *County of Monroe*, 678 F.2d at 1134. In *Employees*, Missouri had been operating hospitals long before the 1966 amendment extended the coverage of the FELA to state employees. In *Edelman*, similarly, Illinois was faced with a federal statute that appeared to impose only the sanction of future funding curtailment, and not a damage suit for benefits wrongfully withheld. Neither Illinois nor Missouri thus had "sufficient notice that it would be liable for damages if it participated in the federal programs." *Id.* As a result, neither state had a "real option to discontinue its participation in the activities subject to federal regulation and forego the accompanying benefits." *Ibid.* The choice between terminating "vital public services" and waiving eleventh amendment immunity was "no true choice at all." *Employees*, 411 U.S. at 296 (Marshall, *J.*, concurring).

The instant case is analogous to *Parden*. The 1793 Act was enacted two years prior to the state's purchase of Oneida land. Thus, the State had adequate notice that it was subject to the statute's strictures. *See generally supra*. As the district court noted, on several occasions President Washington and Secretary Knox urged New York to comply with the 1793 Act. *See* 434 F. Supp. at 534-35. The state chose to ignore their admonitions. The State's proprietary purchase of Indian land thus was an act wholly outside "the sphere that is exclusively its own and enter[ed the state] into activities subject to congressional regulation . . . ." *Parden*, 377 U.S. at 196. The State's act, "with its 'eyes wide open,' " *County of Monroe*, 678 F.2d at 1134, quoting *Edelman*, 415 U.S. at 693 (Marshall, *J.*, dissenting), "subjects itself to that regulation as fully as if it were a private person or corporation." *Parden*, 377 U.S. at 196. Therefore, we agree with the district court's determination that New York impliedly

consented to a waiver of its eleventh amendment immunity.

* * * * *

We affirm the judgment of the district court which held the Counties liable for illegal occupation of the Oneida land, and its judgment that the State of New York must indemnify the Counties for any damages assessed against them.

We remand for further proceedings to determine the good faith claims of the Counties as they bear on any set-off for improvements made on the property, and for recomputation of damages.

MESKILL, *Circuit Judge*, dissenting:

I respectfully dissent.

The implications of the majority's decision are far reaching and I believe that the decision is wrong. The present dispute involves 871.92 acres of land and a judgment for $16,694, plus interest, for two years' use thereof, not an unusually significant amount in and of itself. But the court does not specify any limiting principles in this area. I see nothing in the majority's opinion which, when coupled with our decision in *Oneida Indian Nation of New York* v. *New York*, 691 F.2d 1070 (2d Cir. 1982), would prevent the Oneida or any other tribe from suing for the full value of all land taken from them at any time during our nation's history in contravention of federal law—to say nothing of the possibility of bringing an action for ejectment. Courts should be reluctant to invite such potentially staggering claims on the skimpy authority relied on today by the majority.

This is not to deny the wrongs that Indian tribes have suffered. They do exist and surely require attention. However, the remedy should not be created by a court of law acting in an environment of legal uncertainty. These are essentially political problems which require a comprehensive solution that the judiciary cannot provide in one sitting.[1] Today's decision is likely to interfere with rather than advance the federal government's policies towards Indians.

To decide that Indian land claims should be resolved by judicial fiat is not only unwise, it is also unnecessary. The Indian tribes have remedies available without resort to the federal courts. Congress has established administrative procedures to resolve Indian land claims and the federal government can sue in federal court to enforce Indian land rights.[2] If the existing federal administrative mechanism is ineffective, the Indians' proper remedy is not in the federal courts, but rather in Congress.

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1 The Indian tribes are considered sovereigns "which, by government structure, culture, and source of sovereignty, are in many ways foreign to the constitutional institutions of the Federal and State Governments." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 71 (1978); *see also Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 139-40 (1982); *United States* v. *Wheeler*, 435 U.S. 313, 322-23 (1978). Relations with Indian tribes can thus be analogized to relations with foreign nations. The Supreme Court has shown great reluctance to interfere with or take actions that might embarrass the federal political branches' conduct of foreign affairs, *see, e.g., Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 697 (1976) (plurality opinion); *First Nat'l City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972) (plurality opinion); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 431-33 (1964); *Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945); *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 146 (1812) (Marshall, *C.J.*).

2 *See United States* v. *Santa Fe Pacific R.R. Co.*, 314 U.S. 339 (1941); *United States* v. *Candelaria*, 271 U.S. 432 (1926); *Cramer* v. *United States*, 261 U.S. 219 (1923).

I

The majority holds today that the Oneida may maintain a direct action to recover damages for wrongful occupancy. Despite the majority's claim to the contrary, this is truly a novel legal principle. There never has been, and this Court should not now create, a federal common law action. No case has ever held that an Indian tribe may maintain a direct action for damages based upon federal common law.

From the outset of the Union, Indians were considered wards of the United States; the federal government assumed the role of their guardian. *See, e.g., United States* v. *Sandoval*, 231 U.S. 28, 46 (1913); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (Marshall, *C.J.*) ("[T]hey are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants . . . ."); *cf. United States* v. *Kagama*, 118 U.S. 375, 384 (1886) ("From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.").

From the special guardianship relation between the United States and the Indian tribes, it can be inferred that the Indians should be subject to liabilities under federal law only when Congress sets up a statutory scheme. This has long been settled law. *See, e.g., United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940) (reaffirming that tribal sovereign immunity is coextensive with that of the United States; "[t]hese Indian Nations are exempt from suit without Congressional authorization."). Similarly, it follows that their federal rights should also be based on specific congressional acts. Far from a leap of logic, this is equally settled law:

> The civil rights incident to States and individuals as recognized by what may be called the "law of the land" have not been accorded either to Indian nations, tribes, or Indians. *Whenever they have asserted a legal capacity in the maintenance of their rights, it has been in pursuance of some statute of the United States* specially *conferring upon them the civil rights of suitors. In all the cases in this court in which the interest of an Indian tribe has been the subject of litigation the proceeding has been under special statute conferring the right upon the claimant to bring a suit.* The ordinary jurisdiction as to persons has never been sought to enforce against the United States the fullfillment of their obligations or the discharge of their duties.

Jaeger v. *United States*, 27 Ct. Cl. 278, 284-85 (1892) (emphasis supplied).[3]

Special statutes giving Indians the rights of suitors were necessary because it was inconceivable to lawmakers and judges in the era of early American common law that Indian tribes would resort to courts of law to enforce their legal rights. *See Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) at 17 (Marshall, *C.J.*) ("At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a

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3 *See Karrahoo* v. *Adams*, 14 F. Cas. 134 (C.C.D. Kan. 1870) (Federal circuit court had no jurisdiction in a case involving a non-citizen Indian whose complaint did not raise a federal question).

redress of wrong, had perhaps never entered the mind of an Indian or of his tribe."). Thus, viewed from a common law perspective, it is apparent that there never existed a federal common law private cause of action for damages.

Assuming *arguendo* that a federal common law cause of action in favor of the Indians existed, it was preempted by the Trade and Intercourse Acts.

When Congress addresses directly and comprehensively a question previously governed by federal or state common law, that common law is preempted. *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1 (1981). While the majority does not dispute this, it finds that Congress did not intend to preempt the field because the Trade and Intercourse Acts were not comprehensive statutes. This explanation ignores existing Supreme Court case law on preemption and improperly addresses the issue of congressional intent.

The majority points out that the Acts "did not speak directly to the question of the Indians' ability to enforce their possessory rights by an action in ejectment."[4] But Congress need not specifically legislate on a subject in order to preempt a particular field. In *Hines* v. *Davidowitz*, 312 U.S. 52 (1941), the Supreme Court held a Pennsylvania alien registration statute invalid under the Supremacy Clause partly because the state statute interfered with the federal scheme of registration, even though the state and federal statutes were not explicitly contradictory and there was no express congressional intent to override state legislation. The Court noted that "[e]xperience has shown that international controversies

4 It is not surprising that the Act did not expressly refer to an "existing" federal common law right. Of all the cases cited by the majority to indicate the existence of such a cause of action, *not one* was decided before 1793.

of the greatest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government." 312 U.S. at 64. The Court thus reasoned that state law which potentially conflicted with federal law in this sensitive area had to fall because the federal government was the agent of foreign policy in our country and, as the agent, it had determined that a particular scheme of registration was necessary in order to avoid friction with other nations.

The majority ignores the fact that the legislation at the heart of the instant dispute addresses issues of intergovernmental relations as sensitive as those in *Hines*. As the majority notes, President Washington and Secretary of War Knox urged congressional protection of Indian lands in order to reassure Indians who had grown "restive." This protection was provided by the 1790 Act; criminal and other sanctions were added in 1793 in order to put teeth in the 1790 Act. The statutes at issue in *Hines* and in the instant dispute were passed for the same purpose, to avoid war. There can be no justification for finding preemption of state statutory law in the former case but not preemption of federal common law in the latter. Indeed, the present holding turns the normal presumptions about preemption on their respective heads, as federal courts are usually quicker to find preemption of federal common law than state law. *In re Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981). *See Illinois* v. *Outboard Marine Corp.*, 680 F.2d 473, 478 (7th Cir. 1982).

The majority also tries to determine whether the early congressional scheme was comprehensive from a late twentieth century perspective. But, we must remember that it is the intent of the 2nd Congress which we search for here, not the perceived views of a Congress elected

many years later. It is true that the 1790 and 1793 Acts were not comprehensive by today's standards, but they did proscribe certain acts and provide civil and criminal sanctions. Given the hypertechnical nature of the law in the late 18th century, it is unrealistic to believe that Congress intended to allow remedies concurrent to those explicitly promulgated.

The majority's reliance on the language in *United States* v. *Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 354 (1941), is inappropriate, inasmuch as that case involved a mid-19th century statute which allegedly abolished the Indians' aboriginal rights. There, the Supreme Court was talking about the extinguishment of undisputed title to land, not the preemption of a questionable right of a ward to a private cause of action.

II

The majority states that the Nonintercourse Acts were passed to protect Indian tribes and determines, on the basis of the language cited in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 374-75 (1982), that when a statute is enacted in order to benefit a special class of beneficiaries, the judiciary will normally recognize a remedy for class members if the statute was passed prior to *Cort* v. *Ash*, 422 U.S. 66 (1975). Therefore, reasons the majority, when Congress passed the aforementioned Acts it must have intended that the beneficiaries would be able to enforce their rights by a private action. While superficially appealing, this argument lacks the support of either precedent or legislative history. *Merrill Lynch* does not address the question whether a private cause of action should be implied where Congress has explicitly granted the federal government the power

to sue to protect the rights of the particular group benefited by the statute.

The majority is correct that the Acts were passed in order to protect Indian tribes. However, it takes a great leap of logic to suppose that the Congresses that passed the Acts intended the Indian tribes to have a private cause of action for violations of these Acts. It is difficult to believe that at that time Congress would have left it to the courts to imply such a significant and far reaching remedy, particularly when we remember that the Acts were passed in order to avoid war with the Indian tribes. Obviously Congress never intended the remedy to be available.

I believe that the lower courts that have assumed a private cause of action for a violation of the Acts, *see, e.g.*, *Mashpee Tribe* v. *New Seabury Corp.*, 427 F.Supp. 899, 903 (D. Mass. 1977); *Schaghticoke Tribe of Indians* v. *Kent School Corp.*, 423 F.Supp. 780, 784 (D. Conn. 1976); *Narragansett Tribe of Indians* v. *Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798, 805 & n.3 (D.R.I. 1976), are in error. They use neither legislative history nor valid precedent[5] to support their position.

Similarly, the need for private enforcement because of poor government performance in this area should not affect the outcome here. The government's failure to enforce Indian rights vigorously provides a strong argument for the need for private enforcement. That argument should be made to Congress, however. We should not perform a legislative function. Furthermore, when

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5 These cases all rest upon decisions that recognized a private right of action to Indians when the United States had the power to sue on the same cause of action and to seek the same relief. They do not support the proposition that if the government has a statutorily based power to pursue a remedy, the Indians may bring their own action for a different remedy that does not arise out of the same statute.

construing a statute passed in the late 18th century, we should not consider events which transpired, or failed to transpire, in the subsequent 200 years in order to shed light on congressional intent.

The majority states that even under traditional *Cort* v. *Ash*, 422 U.S. 66 (1975), criteria, a private cause of action may be maintained. I believe the opposite conclusion to be the case here.

This case does not satisfy the second prong of the *Cort* test, namely, whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one." 422 U.S. at 78. I believe that congressional silence on this question indicates a desire not to include a private cause of action as a remedy.

The majority states that Congress intended in the 1793 Act to provide "maximum protection" to Indian land. Assuming this to be true, Congress probably never believed private action necessary in order to accomplish maximum protection. The Act provided for criminal sanctions for violations and included a provision authorizing the executive branch to remove violators from Indian land.[6] These sanctions if utilized would appear to be full and adequate remedies for the conduct that Congress wished to proscribe. Furthermore, it would have been an easy matter for Congress to provide for a private cause of action in favor of Indian tribes or to expressly continue an existing common law remedy if one existed. The failure to do so indicates to me that Congress either did not wish to enact such a remedy or that it never considered the issue. Either explanation would produce the same result—no private cause of action was intended.

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6 *See* Majority op. n.12.

The court's reference to *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 18-19 (1979), is inappropriate. There, the Court dealt with a statute, section 215 of the Investment Advisers Act of 1940, that only declared certain contracts void. Neither sanctions, nor remedies, nor any mechanism for voiding contracts were explicitly provided. By contrast, the 1790 Act, *as amended* by the Act of 1793, *did* explicitly provide sanctions and an enforcement mechanism. Indeed, these later enforcement provisions were included *because* the 1790 Act lacked them.

By contrast, the instant dispute is analogous to the claim in *Transamerica* for a private cause of action under section 206 of the Investment Advisers Act. Congress expressly provided judicial and administrative means to enforce section 206 rights, including criminal penalties and authorization to the SEC to enjoin compliance with the Act. 444 U.S. at 20. The Court stated that "[i]n view of these express provisions for enforcing the duties imposed by § 206, it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action.' " *Id.* (citation omitted). As the Supreme Court noted, "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' " *Id.* at 19-20 (citation omitted).

The same reasoning is applicable to the present case. Because Congress explicitly provided for remedies and sanctions in the 1793 Act, it is "highly improbable" that it forgot to include a private cause of action. This is particularly true in view of the importance that Congress

and the President placed on the matter of Indian affairs in the 1790s.

The majority's characterization of the 1822 Act is not convincing. The provision in the 1822 Act referring to Indians as parties does not only make sense, as the majority claims, "if Congress had intended the Trade and Intercourse Acts to authorize Indians to appear as plaintiffs to enforce the Acts, as well as to be defendants." This provision also applies to a suit in which the government seeks to enforce Indians' rights on their behalf. *See Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). In such a case, the Indians in question would be the real parties in interest. Congress could have been indicating that in this type of action the burden of proof would not be on the government as plaintiff-guardian.

In sum, I believe there is no basis upon which the majority can imply a private cause of action by Indians to recover damages for wrongful possession. To hold otherwise is a novel proposition of law, with consequences too broad to be established on such shaky grounds. Demands for redress of violations of the Acts are better directed to the other branches of the federal government.

I would reverse and remand with directions to dismiss the complaint.

TRADE AND INTERCOURSE ACT OF 1793

An Act to regulate Trade and Intercourse with the Indian Tribes.

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no person shall be permitted to carry on any trade or intercourse with the Indian tribes, without a license under the hand and seal of the superintendent of the department, or of such other person, as the President of the United States shall authorize to grant licenses for that purpose; which superintendent, or person so authorized shall, on application, issue such license for a term not exceeding two years, to any proper person, who shall enter into bond with one or more sureties approved of by the President of the United States, in the penal sum of one thousand dollars, payable to the United States, conditioned for the true and faithful observance of such rules, regulations and restrictions, as are or shall be made, for the government of trade and intercourse with the Indian tribes. The said superintendents, and persons licensed, as aforesaid, shall be governed, in all things touching the said trade and intercourse, by such rules and regulations, as the President of the United States shall prescribe.

Sec. 2. And be it further enacted, That the superintendent, or person issuing such license, shall have full power and authority to recall the same, if the person so licensed shall transgress any of the regulations or restrictions, provided for the government of trade and intercourse with the Indian tribes, and shall put in suit such bonds, as he may have taken, on the breach of any condition therein contained.

Sec. 3. And be it further enacted, That every person, who shall attempt to trade with the Indian tribes, or shall be found in the Indian country, with such merchandise in his possession, as are usually vended to the Indians, without lawful

license, shall forfeit all the merchandise offered for sale to the Indians, or found in his possession, in the Indian country, and shall, moreover, be liable to a fine not exceeding one hundred dollars, and to imprisonment not exceeding thirty days, at the discretion of the court, in which the trial shall be: Provided, That any citizen of the United States, merely travelling through any Indian town or territory, shall be at liberty to purchase, by exchange or otherwise, such articles as may be necessary for his subsistence, without incurring any penalty.

Sec. 4. And be it further enacted, That if any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement, or territory, belonging to any nation or tribe of Indians, and shall there commit murder, robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen thereof, would be punishable by the laws of such state or district, such offender shall be subject to the same punishment, as if the offence had been committed within the state or district, to which he or she may belong, against a citizen thereof.

Sec. 5. And be it further enacted, That if any such citizen or inhabitant shall make a settlement on lands belonging to any Indian tribe, or shall survey such lands, or designate their boundaries, by marking trees, or otherwise, for the purpose of settlement, he shall forfeit a sum not exceeding one thousand dollars, nor less than one hundred dollars, and suffer imprisonment not exceeding twelve months, in the discretion of the court, before whom the trial shall be: And it shall, moreover be lawful for the President of the United States, to take such measures, as he may judge necessary, to remove from lands belonging to any Indian tribe, any citizens or inhabitants of the United States, who have made, or shall hereafter make, or attempt to make a settlement thereon.

Sec. 6. And be it further enacted, That no person shall be permitted to purchase any horse of an Indian, or of any white man in the Indian territory, without special license for that purpose; which license, the superintendent, or such other person, as the President shall appoint, is hereby authorized to grant, on the same terms, conditions and restrictions, as other licenses are to be granted under this Act: Provided also, That every person, who shall purchase a horse or horses, under such license, before he exposes such horse or horses for sale, and within fifteen days after they shall have been brought out of the Indian country, shall make a particular return, to the superintendent, or other person, from whom he obtained his license, of every horse by him purchased, as aforesaid, describing such horses, by their color, height and other natural or artificial marks, under the penalties contained in their respective bonds. And every person, purchasing a horse or horses, as aforesaid, in the Indian country, without a special license, shall, for every horse thus purchased and brought into any settlement of citizens of the United States forfeit, for every horse thus purchased, or brought from the Indian country, a sum not more than one hundred dollars, nor less than thirty dollars, to be recovered in any court of record having competent jurisdiction. And every person, who shall purchase a horse, knowing him to be brought out of the Indian territory, by any person or persons not licensed, as above, to purchase the same, shall forfeit the value of such horse: one half for the benefit of the informant, the other half for the use of the United States, to be recovered, as aforesaid.

Sec. 7. And be it further enacted, That no agent, superintendent, or other person authorized to grant a license to trade, or purchase horses, shall have any interest or concern in any trade with the Indians, or in the purchase or sale of any horses, to or from any Indian; and that any person, offending herein, shall forfeit one thousand dollars, and be imprisoned, at the

discretion of the court, before which the conviction shall be had, not exceeding twelve months.

Sec. 8. And be it further enacted, That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held, or claimed: Provided nevertheless, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty.

Sec. 9. And be it further enacted, That in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall and may be lawful for the President of the United States, to cause them to be furnished with useful domestic animals, and implements of husbandry, and also to furnish them with goods or money, in such proportions, as he shall judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think proper: Provided, That the whole amount of such presents, and allowance to agents, shall not exceed twenty thousand dollars per annum.

Sec. 10. And be it further enacted, That the superior courts of each of the said territorial districts, and the circuit courts, and other courts of the United States of similar jurisdiction in criminal causes in each district of the United States, into which any offender against this act shall be first brought, or in which he shall be apprehended, shall have, and are hereby invested with full power and authority, to hear and determine all crimes, offences and misdemeanors against this act; such courts proceeding therein, in the same manner, as if such crimes, offences and misdemeanors had been committed within the bounds of their respective districts: And in all cases, where the punishment shall not be death, the county courts of quarter sessions in the said territorial districts, and the district courts of the United States, in their respective districts, shall have, and are hereby invested with like power to hear and determine the same.

Sec. 11. And be it further enacted, That it shall and may be lawful for the President of the United States, and for the governors of such territorial districts, respectively, on proof to them made, that any citizen or citizens of the United States, or of the said districts, or either of them, have been guilty of any of the said crimes, offences or misdemeanors, within any town, settlement or territory, belonging to any nation or tribe of Indians, to cause such person or persons to be apprehended, and brought into either of the United States, or of the said districts, and to be proceeded against in due course of law. And in all cases, where the punishment shall be death, it shall be lawful for the governor of the district, into which the offender may be first brought, or in which he may be apprehended, to issue a commission of oyer and terminer to the superior judges of the district, who shall have full power and authority to hear and determine all such capital cases, in the same manner, as the superior courts of such districts have, in their ordinary sessions: And when the offender shall be

brought into, or shall be apprehended in any of the United States, except Kentucky, it shall be lawful for the President of the United States, to issue a like commission to any two judges of the supreme court of the United States, and the judge of the district, in which the offender may have been apprehended or first brought; which judges, or any two of them, shall have the same jurisdiction in such capital cases, as the circuit court of such district, and shall proceed to trial and judgment, in the same manner, as such circuit court might or could do.

Sec. 12. And be it further enacted, That all fines and forfeitures, which shall accrue under this act, shall be, one half to the use of the informant, and the other half, to the use of the United States, except where the prosecution shall be first instituted on behalf of the United States, in which case, the whole shall be to their use.

Sec. 13. And be it further enacted, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the jurisdiction of any of the individual states.

Sec. 14. And be it further enacted, That all and every other act and acts coming within the purview of this act, shall be and are hereby repealed.

Sec. 15. And be it further enacted, That this act shall be in force, for the term of two years, and from thence to the end of the then next session of Congress, and no longer.

APPROVED, March 1, 1793.

TRADE AND INTERCOURSE ACT OF 1796

An Act to regulate Trade and Intercourse with the Indian Tribes, and to preserve Peace on the Frontiers.

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following boundary line, established by treaty between the United States and various Indian tribes, shall be clearly ascertained, and distinctly marked, in all such places, as the President of the United States shall deem necessary, and in such manner as he shall direct, to wit: Beginning at the mouth of Cayahoga river on Lake Erie, and running thence up the same, to the portage between that and the Tuscaroras branch of the Muskingum; thence down that branch, to the crossing place above Fort Lawrence; thence westerly to a fork of that branch of the Great Miami river, running into the Ohio, at, or near which fork, stood Laromie's store, and where commences the portage, between the Miami of the Ohio, and Saint Mary's river, which is a branch of the Miami, which runs into Lake Erie; thence a westerly course to Fort Recovery, which stands on a branch of the Wabash; thence southwesterly, in a direct line to the Ohio, so as to intersect that river, opposite the mouth of Kentucky or Cuttawa river; thence down the said river Ohio, to the tract of one hundred and fifty thousand acres, near the rapids of the Ohio, which has been assigned to General Clark, for the use of himself and his warriors; thence around the said tract, on the line of the said tract, till it shall again intersect the said river Ohio; thence down the same, to a point opposite the high lands or ridge between the mouth of the Cumberland and Tennessee rivers; thence easterly on the said ridge, to a point, from whence, a southwest line will strike the mouth of Duck river; thence still easterly on the said ridge, to a point forty miles above Nashville; thence northeast, to Cumberland river; thence up the said river, to where the Kentucky road crosses

the same; thence to the top of Cumberland mountain; thence along Campbell's line, to the river Clinch; thence down the said river, to a point from which a line shall pass the Holsten, at the ridge, which divides the waters running into Little River, from those running into the Tennessee; thence south, to the North Carolina boundary; thence along the South Carolina Indian boundary, to and over the Ocunna mountain, in a southwest course, to Tugelo river; thence in a direct line, to the top of the Currahee mountain, where the Creek line passes it; thence to the head or source of the main south branch of the Oconee river, called the Appalachee; thence down the middle of the said main south branch and river Oconee, to its confluence with Oakmulgee, which forms the river Altamaha; thence down the middle of the said Altamaha, to the old line on the said river; and thence along the said old line to the river Saint Mary's; Provided always, that if the boundary line between the said Indian tribes and the United States, shall, at any time hereafter, be varied, by any treaty which shall be made between the said Indian tribes and the United States, then all the provisions contained in this act, shall be construed to apply to the said line so to be varied, in the same manner, as the said provisions now apply to the boundary line herein before recited.

Sec. 2. And be it further enacted, That if any citizen of, or other person resident in the United States, or either of the territorial districts of the United States, shall cross over, or go within the said boundary line, to hunt, or in any wise destroy the game; or shall drive, or otherwise convey any stock of horses or cattle to range, on any lands allotted or secured by treaty with the United States, to any Indian tribes, he shall forfeit a sum not exceeding one hundred dollars, or be imprisoned not exceeding six months.

Sec. 3. And be it further enacted, That if any such citizen, or other person, shall go into any country, which is allotted, or

secured by treaty as aforesaid to any of the Indian tribes south of the river Ohio, without a passport first had and obtained from the governor of some one of the United States, or the officer of the troops of the United States commanding at the nearest post on the frontiers, or such other person, as the President of the United States may, from time to time, authorize to grant the same, shall forfeit a sum not exceeding fifty dollars, or be imprisoned, not exceeding three months.

Sec. 4. And be it further enacted, That if any such citizen or other person, shall go into any town, settlement or territory, belonging, or secured by treaty with the United States, to any nation or tribe of Indians, and shall there commit robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians which would be punishable, if committed within the jurisdiction of any state, against a citizen of the United States; or, unauthorized by law, and with a hostile intention, shall be found on any Indian land, such offender shall forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding twelve months; and shall also, when property is taken or destroyed, forfeit and pay to such Indian or Indians, to whom the property taken and destroyed belongs, a sum equal to twice the just value of the property so taken or destroyed: And if such offender shall be unable to pay a sum at least equal to the said just value, whatever such payment shall fall short of the said just value, shall be paid out of the treasury of the United States: Provided nevertheless, that no such Indian shall be entitled to any payment out of the treasury of the United States, for any such property taken or destroyed, if he, or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence.

Sec. 5. And be it further enacted, That if any such citizen, or other person, shall make a settlement on any lands belonging, or secured, or granted by treaty with the United States,

to any Indian tribe, or shall survey, or attempt to survey, such lands, or designate any of the boundaries, by marking trees, or otherwise, such offender shall forfeit all his right, title and claim, if any he hath, of whatsoever nature or kind the same shall or may be, to the lands aforesaid, whereupon he shall make a settlement, or which he shall survey, or attempt to survey, or designate any of the boundaries thereof, by marking trees or otherwise, and shall also forfeit a sum not exceeding one thousand dollars and suffer imprisonment not exceeding twelve months. And it shall, moreover, be lawful for the President of the United States, to take such measures and to employ such military force, as he may judge necessary, to remove from lands belonging, or secured by treaty, as aforesaid, to any Indian tribe, any such citizen or other person, who has made or shall hereafter make, or attempt to make a settlement thereon: And every right, title, or claim forfeited under this act, shall be taken and deemed to be vested in the United States, upon conviction of the offender without any other or further proceeding.

Sec. 6. And be it further enacted, That if any such citizen, or other person, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit murder, by killing any Indian or Indians, belonging to any nation or tribe of Indians in amity with the United States, such offender, on being thereof convicted, shall suffer death.

Sec. 7. And be it further enacted, That no such citizen, or other person, shall be permitted to reside at any of the towns, or huntingcamps, of any of the Indian tribes as a trader, without a license under the hand and seal of the superintendent of the department, or of such other person as the President of the United States shall authorize to grant licenses for that purpose: which superintendent, or person authorized, shall, on application, issue such license, for a term not exceeding two years, who shall enter into bond, with one or more sureties, ap-

proved of by the superintendent, or person issuing such license, or by the President of the United States, in the penal sum of one thousand dollars, conditioned for the true and faithful observance of such regulations and restrictions, as are, or shall be made for the government of trade and intercourse with the Indian tribes: and the superintendent, or person issuing such license, shall have full power and authority to recall the same, if the person so licensed shall transgress any of the regulations or restrictions provided for the government of trade and intercourse with the Indian tribes; and shall put in suit, such bonds as he may have taken, on the breach of any condition therein contained.

Sec. 8. And be it further enacted, That any such citizen or other person, who shall attempt to reside in any town, or hunting camp, of any of the Indian tribes, as a trader without such license, shall forfeit all the merchandise offered for sale, to the Indians, or found in his possession, and shall, moreover, be liable to a fine not exceeding one hundred dollars, and to imprisonment not exceeding thirty days.

Sec. 9. And be it further enacted, That if any such citizen, or other person, shall purchase, or receive of any Indian, in the way of trade or barter, a gun, or other article commonly used in hunting, any instrument of husbandry, or cooking utensil, of the kind usually obtained by the Indians, in their intercourse with white people, or any article of clothing, excepting skins or furs, he shall forfeit a sum not exceeding fifty dollars, and be imprisoned not exceeding thirty days.

Sec. 10. And be it further enacted, That no such citizen or other person, shall be permitted to purchase any horse of an Indian, or of any white man in the Indian territory, without special license for that purpose; which license, the superintendent, or such other person as the President shall appoint, is hereby authorized to grant, on the same terms, conditions and restrictions, as other licenses are to be granted under this act:

and any such person, who shall purchase a horse or horses, under such license, before he exposes such horse or horse for sale, and within fifteen days after they have been brought out of the Indian country, shall make a particular return to the superintendent, or other person, from whom he obtained his license, of every horse purchased by him, as aforesaid; describing such horses, by their colour, height, and other natural or artificial marks, under the penalty contained in their respective bonds. And every such person, purchasing a horse or horses, as aforesaid, in the Indian country, without a special license, shall, for every horse thus purchased, and brought into any settlement of citizens of the United States, forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding thirty days. And every person, who shall purchase a horse, knowing him to be brought out of the Indian territory, by any person or persons, not licensed, as above, to purchase the same, shall forfeit the value of such horse.

Sec. 11. And be it further enacted, That no agent, superintendent, or other person authorized to grant a license to trade, or purchase horses, shall have any interest or concern in any trade with the Indians, or in the purchase or sale of any horse, to or from any Indian, excepting for, and on account of the United States. And any person offending herein, shall forfeit a sum not exceeding one thousand dollars, and be imprisoned not exceeding twelve months.

Sec. 12. And be it further enacted, That no purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty, or convention, entered into pursuant to the constitution: and it shall be a misdemeanor in any person, not employed under the authority of the United States, to negotiate such treaty or convention directly or indirectly, to treat with any such Indian

nation, or tribe of Indians, for the title or purchase of any lands by them held, or claimed, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months: Provided nevertheless, that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with Indians, under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty.

Sec. 13. And be it further enacted, That in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall be lawful for the President of the United States, to cause them to be furnished with useful domestic animals, and implements of husbandry, and with goods or money, as he shall judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think fit: Provided, that the whole amount of such presents, and allowance to such agents, shall not exceed fifteen thousand dollars per annum.

Sec. 14. And be it further enacted, That if any Indian or Indians, belonging to any tribe in amity with the United States, shall come over or across the said boundary line, into any state or territory inhabited by citizens of the United States, and there take, steal or destroy any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, or shall commit any murder, violence or outrage, upon any such citizen, or inhabitant, it shall be the duty of such citizen or inhabitant, his representative, attorney or agent, to make application to the superintendent, or such other person as the President of the United States shall authorize for that

purpose; who, upon being furnished with the necessary documents and proofs, shall, under the direction or instruction of the President of the United States, make application to the nation or tribe to which such Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time, not exceeding eighteen months, then it shall be the duty of such superintendent, or other person authorized, as aforesaid, to make return of his doings to the President of the United States, and forward to him all the documents and proofs in the case, that such further steps may be taken, as shall be proper to obtain satisfaction for the injury: And, in the mean time, in respect to the property so taken, stolen, or destroyed, the United States guarantee to the party injured, and eventual indemnification: Provided always, that if such injured party, his representative, attorney, or agent, shall, in any way, violate any of the provisions of this act, by seeking, or attempting to obtain private satisfaction or revenge, by crossing over the line, on any of the Indian lands, he shall forfeit all claim upon the United States, for such indemnification: And provided also, that nothing herein contained shall prevent the legal apprehension or arresting, within the limits of any state or district, of any Indian having so offended: And provided further, that it shall be lawful for the President of the United States, to deduct such sum or sums, as shall be paid for the property taken, stolen, or destroyed by any such Indian, out of the annual stipend, which the United States are bound to pay to the tribe, to which such Indian shall belong.

Sec. 15. And be it further enacted, That the superior courts in each of the said territorial districts, and the circuit courts, and other courts of the United States, of similar jurisdiction in criminal causes, in each district of the United States, in which any offender against this act shall be apprehended, or, agreeably to the provisions of this act, shall be brought for trial,

shall have, and are hereby invested with, full power and authority, to hear and determine all crimes, offences and misdemeanors, against this act; such courts proceeding therein, in the same manner, as if such crimes, offences and misdemeanors had been committed within the bounds of their respective districts: And in all cases, where the punishment shall not be death, the county courts of quarter sessions in the said territorial districts, and the district courts of the United States in their respective districts, shall have, and are hereby invested with like power to hear and determine the same, any law to the contrary notwithstanding: And in all cases, where the punishment shall be death, it shall be lawful for the governor of either of the territorial districts, where the offender shall be apprehended, or into which he shall be brought for trial, to issue a commission of oyer and terminer, to the superior judges of such district, who shall have full power and authority to hear and determine all such capital cases, in the same manner, as the superior courts of such district have in their ordinary sessions: And when the offender shall be apprehended, or brought for trial, into any of the United States, except Kentucky, it shall be lawful for the President of the United States, to issue a like commission to any one or more judges of the supreme court of the United States, and the judge of the district, in which such offender may have been apprehended, or shall have been brought for trial; which judges, or any two of them, shall have the same jurisdiction in such capital cases, as the circuit court of such district, and shall proceed to trial and judgment, in the same manner, as such circuit court might or could do. And the district courts of Kentucky and Maine shall have jurisdiction of all crimes, offences and misdemeanors committed against this act, and shall proceed to trial and judgment, in the same manner, as the circuit courts of the United States.

Sec. 16. And be it further enacted, That it shall be lawful for the military force of the United States, to apprehend every person, who shall, or may be found in the Indian country, over and beyond the said boundary line, between the United States and the said Indian tribes, in violation of any of the provisions or regulations of this act, and him or them immediately to convey, in the nearest convenient and safe route, to the civil authority of the United States, in some one of the three next adjoining states or districts, to be proceeded against, in due course of law: Provided, that no person, apprehended by military force, as aforesaid, shall be detained longer than ten days, after the arrest, and before removal.

Sec. 17. And be it further enacted, That if any person, who shall be charged with a violation of any of the provisions or regulations of this act, shall be found within any of the United States, or either of the territorial districts of the United States, such offender may be there apprehended and brought to trial, in the same manner, as if such crime or offence had been committed within such state or district; and it shall be the duty of the military force of the United States, when called upon by the civil magistrate, or any proper officer, or other person duly authorized for that purpose, and having a lawful warrant, to aid and assist such magistrate, officer, or other person authorized, as aforesaid, in arresting such offender, and him committing to safe custody, for trial according to law.

Sec. 18. And be it further enacted, That the amount of fines, and duration of imprisonment, directed by this act as a punishment, for the violation of any of the provisions thereof, shall be ascertained and fixed, not exceeding the limits prescribed, in the discretion of the court, before whom the trial shall be had; and that all fines and forfeitures, which shall accrue under this act, shall be, one half to the use of the informant, and the other half to the use of the United States: Except where the prosecution shall be first instituted on behalf of the United States; in which case, the whole shall be to their use.

Sec. 19. And be it further enacted, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states; or the unmolested use of a road from Washington district, to Mero district; and of the navigation of the Tennessee river, as reserved and secured by treaty.

Sec. 20. And be it further enacted, That the President of the United States be, and he is hereby authorized, to cause to be clearly ascertained, and distinctly marked, in all such places as he shall deem necessary, and in such manner as he shall direct, any other boundary lines between the United States and any Indian tribe, which now are, or hereafter may be established by treaty.

Sec. 21. And be it further enacted, That all and every other act and acts, coming within the purview of this act, shall be, and they are hereby repealed: Provided, nevertheless, that all disabilities, that have taken place, shall continue and remain; all penalties and forfeitures, that have been incurred, may be recovered; and all prosecutions and suits, that may have been commenced, may be prosecuted to final judgment, under the said act or acts, in the same manner, as if the said act or acts were continued, and in full force and virtue.

Sec. 22. And be it further enacted, That this act shall be in force, for the term of two years, and from thence to the end of the session of Congress next thereafter, and no longer.

APPROVED, May 19, 1796.

TITLE 25, UNITED STATES CODE § 177

§ 177. Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

TITLE 28, UNITED STATES CODE § 2415

§ 2415. Time for commencing actions brought by the United States

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable

administrative proceedings required by contract or by law, whichever is later: Provided, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment: Provided further, That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued: Provided further, That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed sixty days after the date of publication of the list required by section 4(c) of the Indian Claims Act of 1982: Provided, That, for those claims that are on either of the two lists published pursuant to the Indian Claims Act of 1982, any right of action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim or (2) three years after the date the Secretary of the Interior has submitted legislation or legislative report to Congress to resolve such claim or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: Provided, That an action to recover damages resulting from a trespass on lands of the United States:

an action to recover damages resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status which accrued on the date of enactment of this Act in accordance with subsection (g) may be brought on or before sixty days after the date of the publication of the list required by section 4(c) of the Indian Claims Act of 1982: Provided, That, for those claims that are on either of the two lists published pursuant to the Indian Claims Act of 1982, any right of action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim or (2) three years after the Secretary of the Interior has submitted legislation or legislative report to Congress to resolve such claim.

(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

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(g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act.

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TREATY OF CANANDAIGUA, NOVEMBER 11, 1794, 7 STAT. 44

A Treaty between the United States of America, and the Tribes of Indians called the Six Nations.

The President of the United States having determined to hold a conference with the Six Nations of Indians, for the purpose of removing from their minds all causes of complaint, and establishing a firm and permanent friendship with them; and Timothy Pickering being appointed sole agent for that purpose; and the agent having met and conferred with the Sachems, Chiefs and Warriors of the Six Nations, in a general council: Now, in order to accomplish the good design of this conference, the parties have agreed on the following articles; which, when ratified by the President, with the advice and consent of the Senate of the United States, shall be binding on them and the Six Nations.

Article I.

Peace and friendship are hereby firmly established, and shall be perpetual, between the United States and the Six Nations.

Article II.

The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof; but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

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Article IV.

The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senekas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor even disturb the people of the United States in the free use and enjoyment thereof.

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Article VI.

In consideration of the peace and friendship hereby established, and of the engagements entered into by the Six Nations: and because the United States desire, with humanity and kindness, to contribute to their comfortable support; and to render the peace and friendship hereby established, strong and perpetual; the United States now deliver to the Six Nations, and the Indians of the other nations residing among and united with them, a quantity of goods of the value of ten thousand dollars. And for the same considerations, and with a view to promote the future welfare of the Six Nations, and of their Indian friends aforesaid, the United States will add the sum of three thousand dollars to the one thousand five hundred dollars, heretofore allowed them by an article ratified by the President, on the twenty-third day of April, 1792; making in the whole, four thousand five hundred dollars; which shall be expended yearly forever, in purchasing clothing, domestic animals, implements of husbandry, and other utensils suited to their circumstances, and in compensating useful artificers,

who shall reside with or near them, and be employed for their benefit. The immediate application of the whole annual allowance now stipulated to be made by the superintendent appointed by the President for the affairs of the Six Nations, and their Indian friends aforesaid.

Article VII.

Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree, that for injuries done by individuals on either side, no private revenge or retaliation shall take place, but, instead thereof, complaint shall be made by the party injured, to the other: By the Six Nations or any of them, to the President of the United States, or the Superintendent by him appointed: and by the Superintendent, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the nation to which the offender belongs: and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken; until the legislature (or great council) of the United States shall make other equitable provision for the purpose.

NOTE. It is clearly understood by the parties to this treaty, that the annuity stipulated in the sixth article, is to be applied to the benefit of such of the Six Nations and of their Indian friends united with them as aforesaid, as do or shall reside within the boundaries of the United States: For the United States do not interfere with nations, tribes or families, of Indians elsewhere resident.

In witness whereof, the said Timothy Pickering, and the sachems and war chiefs of the said Six Nations, have hereto set their hands and seals.

Done at Konondaigua, in the State of New York, the eleventh day of November, in the year one thousand seven hundred and ninety-four. [There follows a series of signatures.]

TREATY OF SEPTEMBER 15, 1795

This Indenture made the fifteenth day of September One thousand seven hundred and ninety five Between the Sachems, Warriors and Women of the Oneida Nation of Indians by Jacob Reed, Peter Bread; Thomas Whitebeans & others whose names are hereunto subscribed as Deputies and attornies authorized and empowered for that purpose by a certain Instrument in writing under the hands and seals of said Sachems, Warriors and Women of the said Nation bearing date the first day of September instant of the first part and Philip Schuyler, John Cantine and David Brooks Agents in behalf of the people of the State of New York duly authorized and empowered by an act of the Legislature of the said State passed the 9th day of April, 1795 of the second part:

WHEREAS at a Treaty held at Fort Schuyler in the County of Herkimer on the twenty second day of September One thousand seven hundred and eighty eight between the said parties of the first part and certain commissioners duly authorized and empowered in behalf of the State aforesaid, certain Tracts of Land in the said Treaty particularly specified and described were appropriated and set apart for the use, benefit and behoof of the aforesaid Tribe or Nation of Indians, and

WHEREAS the said Tribe or Nation of Indians have requested of the Legislature of the said State to render a part of the Lands so appropriated and set apart productive of an annual income to them. Now Therefore this Indenture Witnesseth That the said parties of the first part for and in consideration of the sums of money and other stipulations hereinafter mentioned to be paid done and performed by and on the part of the said people of the State aforesaid Have granted, bargained, sold, aliened, remised, transferred, set over, released and confirmed and by these presents Do grant bargain, sell, alien, remise, transfer, set over, release & confirm unto

the said people of the State aforesaid so much of the Lands and set apart in manner aforesaid as is contained within the limits and bounds following to wit: Beginning at a place on the East Bank of the Oneida Lake which place is a bisection of the distance between the mouth of Wood Creek and the mouth of the Oneida Creek, and runs from the said place of bisection Northerly along the Waters of the Oneida Lake to Wood Creek, thence up along Wood Creek until opposite Canada Creek being the North East corner of the Lands appropriated to the use of the said Tribe or Nation of Indians in the Treaty aforesaid Thence along the Eastern Boundary lines of the Lands so appropriated to the South East corner thereof, thence West along the Southern Boundary thereof to the South West corner thereof, thence North along the Western Boundary thereof to the Deep Spring, thence Easterly by the boundary expressed in the said Treaty to the Chittilingo Branch of Canassaderaga Creek thence Southerly along the said Branch so far as to be One mile distant from the Northern Boundary of the Tract of Land leased by the said Tribe or Nation to Peter Smith, thence East by a Line parallel to the said Northern Boundary so far as to a point four miles distant from the Eastern boundary of the Tract so appropriated as aforesaid thence Northerly by strait lines parallel to the Eastern boundary lines of the Lands so appropriated and Keeping four miles distant therefrom until it reaches a place four miles distant from Wood Creek, thence with a strait line to the place of beginning. Excepting thereout so much of the Lands granted to the Stockbridge Indians as is included within the bounds aforesaid; and also Excepting thereout one mile square to include a small settlement of the said Tribe or Nation on the East side of the Lands granted to the Stockbridge Indians; and also all the Lands lying on the North side of the Oneida Lake appropriated and set apart to the use benefit and behoof of the said Nation of Indians at the Treaty aforesaid, and also the Land at

the fishing place in the Onondaga River mentioned in the Treaty aforesaid. To have and to hold all and singular the Lands aforesaid to the people of the State of New York aforesaid for Ever. On condition nevertheless That the said people aforesaid shall immediately on the Execution and Delivery of this Indenture by the said parties of the first part pay to the said Indians the sum of Two thousand nine hundred and Fifty two dollars and annually forever thereafter on the first day of June in each year the like sum of Two thousand nine hundred & fifty two Dollars, at Oneida in the county of Herkimer together with the sum of Six hundred Dollars stipulated by the Treaty aforesaid to be paid to the said Indians; and

WHEREAS Doubts have arisen whether the Tract of Land lying between the Streams known by the name of the Chellingo and the Canaseraga Creeks was intended by the Treaty aforesaid to be included within the limits of the Lands so appropriated and set apart for the aforesaid Indians or not; The parties aforesaid Do by these presents mutually agree That if the Legislature of the State aforesaid shall Quit-claim to the said Indian Tribe or Nation the Lands between the said Streams as far South as an Easterly line from the Deep Spring to the Easternmost of the said Streams, to be drawn by the shortest distance between the said Spring and the said Easternmost Stream, and as far North as the junction of the said two Streams, That then and in that case the said tribe or Nation of Indians shall and they Do by these presents grant, bargain, sell, alien and release to the people of the State of New York aforesaid All that certain Tract of Land within the limits and bounds following Viz: Beginning at the East end of the Oak ridge in the great Road leading from the Oneida Village to the Deep Spring, and runs thence South to the North Bounds of this Tract herein before described as released to the people of this State, thence East along the said North bounds two miles, thence North to the East side of the said Road, thence North

one half Mile thence with a strait line parallel to the General course of that part of the said Road between the East and West Bounds of this Tract until the place of beginning bears South thence South to the place of beginning. Provided always and it is the true intent of these presents that the said Tract shall be surveyed at the expence of the people of the said State, and the quantity of acres contained therein determined, and that for every hundred acres contained therein there shall be annually paid by the people of the State of New York the sum of three Dollars the first payment to be made on the said first day of June next, and a like Sum annually forever thereafter on the first day of June in each Year at Oneida aforesaid; but in case the Legislature of the said State shall not Quit claim the Lands between the said Streams as last aforesaid that then and in that case the Lands described in this article as ceded to the said people shall be and remain to the said Tribe or Nation of Indians; as if this article had never been made and concluded upon anything herein contained to the contrary notwithstanding; and

WHEREAS there was appropriated and set apart to the use, benefit and behoof of the said Tribe or Nation of Indians by the Treaty aforesaid one half mile of Land on each side of Fish Creek; and

WHEREAS the said tribe or Nation of Indians incline to sell so much of the said Lands as lay to the Northward of a certain Creek falling into the said fish Creek, and coming from towards Fort Schuyler; and

WHEREAS it is not possible without a previous Survey to determine the quantity of Lands which they so incline to sell nor the junction of the Creek beyond which the said Tribe or Nation of Indians incline to sell The parties aforesaid Do therefore further mutually agree by these presents, That whenever the quantity of Land comprized within the last mentioned bounds shall be ascertained and the Legislature of the said

State shall determine to purchase the same and pass an act for that purpose that then and in that case the said Tribe or Nation of Indians shall be and hereby are bound to convey and release the same to the people of the State of New York aforesaid; provided that the said people shall annually forever thereafter pay unto the said Tribe or Nation of Indians at and after the rate of three Dollars per annum for every hundred acres contained n the said last mentioned Tract of Land provided always and it is the true intent and meaning of these presents that the said parties of the first part shall when thereunto required assign, transfer, and set over to the aforesaid people the Lease by them heretofore given to Peter Smith or part of the Lands herein first above mentioned.

In Witness Whereof the parties to these presents have hereunto interchangeably set their hands and seals the day and year first herein before first above written

[There follows a series of signatures.]

TREATY OF JUNE 1, 1798

At a Treaty held with the Oneida Nation or Tribe of Indians at their Village in the State of New York on the first Day of June in the Year One Thousand Seven Hundred and Ninety Eight.

PRESENT, Joseph Hopkinson Commissioner appointed under the authority of the United States to hold the Treaty Egbert Benson Ezra L'Hommedieu and John Tayler Agents for the State of New York .....

The said Indians having in the month of March last Proposed to the Goveronor [sic] of the said State to cede the Lands herein after described, for the compensation herein after mentioned — and the said Governor having acceded to the said Proposal, and advanced to the said Indians, at their desire in part Payment of the said Compensation Three Hundred Dollars to answer their then immediate occasions the said cession is thereupon in the presence and with the approbation of the said Commissioner carried into effect at this Treaty, which hath on the request of the said Governor been appointed to be held for the purpose as follows, that is to say, the said Indians do cede release and quit claim to the People of the State of New York forever All the Lands within their Reservation to the Westward and Southwestward of a Line from the Northeastern corner of Lot No. 54 in the last purchase from them running northerly to a button wood tree marked on the east side Oneida R 1798 On the West side FP. S. 1798. and on the South side with three Notches and a blaze standing on the bank of the Oneida Lake in the Southern part of a Bay called Newageghkoo Also a Mile on each side of the Main Genesee Road for the distance of one mile and an half westward to commence at the Eastern boundary of their said Reservation — And also the same Breadth for the distance of three miles

on the south side and of one mile on the north side of the said Road Eastward to commence at the Eastern Boundary of the said Lot No. 54, Provided and excepted nevertheless that the following Indian Families Viz: Sarah Docksteder, Jacob Docksteder, Cornelius Docksteder Lewis Denny John Denny, Jan Joost and Nicholas shall be suffered to possess of the Tract First above mentioned. The Grounds cultivated by them respectively and their improvements not exceeding Fifty Acres to each Family so long as they shall reside there — And in consideration of this Proviso and Exception the said Indians do further Cede that a tract of Twelve Hundred and Eighty Acres, as Follows— that is to say Beginning in the South east Corner of Lot No. 59, in the said last Purchase and running thence East one Mile, thence North two Miles thence West One Mile and thence South Two Miles shall be considered as set Apart by the said Nation or Tribe for the use of the said Families whenever they shall remove from where they now reside, The Said Agents do for the People of the said State pay to the said Indians in addition to the said sum of Three Hundred dollars already advanced to them as above mentioned the further sum of Two Hundred Dollars, And do grant to the said Indians that the People of the said State shall pay to the said Indians at their said Village on the First day of June next and on the first day of June Yearly thereafter the Annual Sum of Seven Hundred Dollars.

In Testimony whereof the said Commissioner, the said Agents and the said Indians have hereunto and to other Acts of the same Tenor and date the One to remain with the United States another to remain with the State of New York and another to remain with the said Indians set their hands and Seals at the Village Aforesaid the Day and Year first above written.

[There follows a series of signatures.]

TREATY OF JUNE 4, 1802

At a Treaty held with the Oneida Nation or Tribe of Indians at their Village in the State of New York, on the fourth day of June in the year of our Lord One Thousand eight Hundred and Two

Present John Tayler Agent appointed under the authority of the United States to hold the Treaty, and Ezra L'Hommedieu and Simeon DeWitt Agents for the State of New York.

The said Indians having by their Sachems Chiefs and Warriors in the month of March last proposed to the Governor of the said State to cede the Lands hereinafter described for the compensation hereinafter mentioned And the said Governor together with the Surveyor General of the said State and Ezra L'Hommedieu Esquire an Agent appointed by the said Governor pursuant to concurrent resolutions of the Senate and Assembly of the State bearing date the 23d and 24 days of February last, having acceded to the proposal of the said Sachems Chiefs and Warriors, and on the fifth day of the said month of March executed a provisional agreement with them for the cession and purchase of the same, and advanced to them at their desire in part payment of the said Compensation three Hundred dollars, to answer the immediate Occasions of the said Indians — The said Cession is thereupon in the presence and with the approbation of the said Commissioner carried into effect at this Treaty which hath on the request of the said Governor been appointed to be held for the purpose, as follows, that is to say, The said Indians do Cede release and quit claim to the people of the State of New York forever the several Tracts or parcels of Land hereinafter described, being parts of the lands heretofore reserved to the said Oneida Nation of Indians To wit, All that certain Tract of Land beginning at the Southwest corner of the Land lying along the Genesee Road, and which was ceded in the year One thousand Seven hundred

and Ninety eight by the said Oneida Indians to the people of the State of New York, and running thence along the last mentioned Tract, easterly to the southeast corner thereof thence southerly in the direction of the continuation of the east bounds of said last mentioned tract, to other lands heretofore ceded by the said Oneida Nation of Indians to the people of the State of New York then along the same westerly to a part of said last mentioned Land called the Two-mile strip, and then along the same northerly to the place of Beginning — Also, another Tract of Land bounded on the south by the Genesee Road, on the North by a Line drawn parallel to said Road — and at the Distance on an average of half a mile to the northward thereof, and extending from the West bounds of a tract of One hundred Acres now ceded and including Myndert Van Eps Wemples house westerly to the Lands heretofore ceded as aforesaid. Provided that the north bounds of the last described tract shall be run with such right Angular offsets as to leave the Indian Houses near the northwesterly corner of said Tract, Twenty chains distant from the same — Also, One Hundred Acres to be laid out in a square and to extend each way from the house of said Myndert Van Eps Wemple along the said Genesee Road fifteen chains and northerly from said Road fourteen chains and Southerly from said road twenty chains Also all that part of the land heretofore reserved by the said Oneida nation of Indians along the Fish Creek which lies to the northward of the Bridge over said Creek commonly called and known by the name of Bloomfields Bridge. The said Agents do for the people of the State of New York in conformity to the said provisional agreement pay to the said Indians in addition to the said sum of Three Hundred Dollars already advanced to them as above mentioned the further sum of Six Hundred Dollars, and do grant to the said Indians that the People of the said State shall annually forever hereafter on such day and place as are or shall be appointed for the Payment of other Annuities to the said Indians pay to the said Indians the sum of Three hundred Dollars. And the said Agents do further grant to the said Indians that the People of the State of New York, out of the lands above described and hereby ceded to them shall grant to Sarah Docksteder One Hundred Acres to be laid out in a square adjoining the Two-Mile Tract, on the Road commonly called Klocks, Road, as the said One Hundred Acres shall be laid out by order of the Surveyor General with the approbation of the said Sarah, to be held to her during her natural life and thereafter to her heirs in fee. And ALSO to Michael Kern One Hundred and fifty Acres, so as to include the House in which he now resides with the other improvements made by him around the Same.

In Testimony whereof the said commissioner the said Agents and the said Indians have hereunto and to other Acts of the same tenor and date the one to remain with the United States another to remain with the State of New York and another to remain with the said Indians, set their hands and seals at the Village aforesaid the day and year first above written.

[There follows a series of signatures.]

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